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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 234

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HENRY PRENTISS & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals for the Second Circuit

HENRY PRENTISS & COMPANY, INC., PLAITIFF-APPELLANT AND appellee

against

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE AND appellee

Statement under rule 13

The above-named plaintiff, Henry Prentiss & Company, Inc., commenced this action by the filing of a petition with the clerk of the United States District Court for the Southern District of New York on 16th day of September, 1927, which petition was subsequently served upon the Attorney General by registered mail and personally upon Charles H. Tuttle, United States attorney for the southern district of New York. There has been no change in parties. On the 19th day of October, 1928, issues were joined and the defendant served an answer to the petition which was filed on the 20th day of October, 1928. An amended answer was served on February 25, 1930, and filed on February 26, 1930. The trial was had on February 26, 1930, before Hon. Francis G. Caffey, judge of the United States district court. Judgment was entered on 20th day of February, 1931, in favor of the plaintiff with respect to taxes sought to be recovered for 1920 and in favor of the defendant with respect to taxes sought to be recovered for 1918. On the 13th day of May, 1931, the plaintiff took an appeal, and on May 19, 1931, the defendant took an appeal.

2 In United States District Court for the Southern District of New York

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

The petition of Henry Prentiss & Company, Inc., respectfully alleges:

1. That the petitioner is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office at 149 Broadway, Borough of Manhattan, city, county, and State of New York, southern district of New York.

2. That at all the times hereinafter mentioned the United States of America was and still is a corporation sovereign, and upon information and belief that at all the times hereinafter mentioned William

H. Edwards was collector of internal revenue for the second district of New York, with offices in the Borough of Manhattan, city, county, and State of New York; that the said William H. Edwards is not at the date of the filing of this petition in the office as collector of internal revenue.

3 3. That petitioner duly filed with William H. Edwards, collector of internal revenue for the second district of New York, on June 16, 1919, income and excess-profits and war-profits tax return for the year ended December 31, 1918, pursuant to the provisions of the revenue act of 1918, and thereafter paid to the said collector of internal revenue for and on behalf of the defendant herein the sum of $645,556.75, as income and excess-profits and war-profits taxes for said year 1918.

4. That petitioner duly filed with said William H. Edwards, collector of Internal revenue for the second district of New York, on or about March 15, 1920, income and excess-profits and war-profits tax return for the year ended December 31, 1919, pursuant to the provisions of the revenue act of 1918, and thereafter paid to the said collector of internal revenue for and on behalf of the defendant herein the sum of $42,851.67 as income and excess-profits and war-profits taxes for said year 1919.

5. That petitioner duly filed with said William H. Edwards, collector of internal revenue for the second district of New York, on or about March 15, 1921, income and excess-profits and war-profits tax return for the year ended December 31, 1920, pursuant to the provisions of the revenue act of 1918, and thereafter paid to the said collector of internal revenue for and on behalf of the defendant herein the sum of $92,265.40 as income and excess-profits and war-profits taxes for said year 1920.

4 6. That on or about the 1st day of September, 1916, petitioner acquired all the business, property, and assets, including name, good will, contracts, and rights of every character and description, of Prentiss Tool & Supply Company, a New York corporation, subject to the debts of said company, and issued in payment therefor all the capital stock of the petitioner of the par value of $500,000, consisting of 5,000 shares of the par value of $100 each; that the actual cash bona fide paid in for said stock or shares as aforesaid, and the actual cash value of tangible property other than cash bona fide paid in for such stock or shares at the time of such payment as aforesaid, amounted to the sum of $994,564.43; that the actual cash value of the said name, good will, contracts, and rights of every character and description bona fide paid in for said stock or shares as aforesaid was $1,400,000.

That included in the tangible properties so acquired by petitioner was certain real estate located in Jersey City, New Jersey, which was entered and carried on the books of the petitioner at an amount of $55,067.08 less than the actual cash value of such property.

That in computing the income and excess-profits and war-profits taxes due from petitioner for each of the years ended December 31, 1918, December 31, 1919, and December 31, 1920, the Commissioner of Internal Revenue has failed, neglected, and refused to include in and as invested capital, and to allow same as paid in surplus, in accordance with the provisions of the revenue act of 1918, the said $55,067.08,

5 being the excess of the actual cash value of said real property over the value thereof appearing on the books of petitioner and over the value allowed therefor by the Commissioner of Internal Revenue in computing invested capital; that said Commissioner has further failed, neglected, and refused to allow as and include in invested capital for said years ended December 31, 1918, December 31, 1919, and December 31, 1920, any part of the said sum of $1,400,000, the actual cash value of the name, good will, contracts, and rights of every character and description for which the capital stock of petitioner was issued in an amount in excess of $125,000, as aforesaid, whereas the said Commissioner of Internal Revenue should have included in said invested capital the said $55,067.08 as paid-in surplus, and $125,000, being twenty-five per cent of the par value of the total stock or shares of petitioner outstanding March 3, 1917. Thereby the invested capital of petitioner was understated in the sum of $180,067.08 by the Commissioner of Internal Revenue in the determination of income and excess profits tax liability for each of said years.

7. By reason of the refusal of the Commissioner of Internal Revenue to include in invested capital of the petitioner the said sum of $180,067.08, said commissioner has illegally, wrongfully, and unlawfully collected and retained from petitioner the sum of $12,719.17 for the year ended December 31, 1918; the sum of $10,000.00 for the year ended December 31, 1919; and the sum of $10,000.00 for the year ended December 31, 1920.

8. That petitioner duly filed claims for refund of over-

6 payments of income and excess-profits taxes as aforesaid, pursuant to the statutes of the United States made and provided, and pursuant to regulations of the Secretary of the Treasury prescribed pursuant to said statutes, upon the ground that said taxes had been illegally and wrongfully assessed and collected.

9. That thereafter certain proceedings were had in connection with the determination of income and invested capital, and in connection with the determination of income and excess-profits taxes of petitioner for the years ended December 31, 1918, December 31, 1919, and December 31, 1920; that from time to time adjustments and changes were made in the income and invested capital of the petitioner and income and excess-profits taxes due for the said years 1918, 1919, and 1920, and certain refunds allowed, no part of which was based upon the inclusion in invested capital of said amount of $180,067.08, and no taxes on account thereof have been refunded and

paid to petitioner, and petitioner's claims for all of said years for inclusion of said sum of $180,067.08 in invested capital have been denied by said commissioner. That two years have not elapsed since the denial and rejection of said claims for refund, and more than six months have elapsed since the filing thereof.

10. The sums of $12,719.17, $10,000.00, and $10,000.00, assessed and collected from petitioner, were illegally and wrongfully collected by the defendant or its agents, and neither on the date of the assessment of said sums by said Commissioner of Internal
7 Revenue, nor on the dates of payment thereof, nor at any time before or since these dates was any part of the income and excess-profits and war-profits taxes herein sued for due and payable by petitioner to the defendant.

11. Petitioner annexes hereto, marked Exhibit A, and makes a part hereof, a schedule of payments by petitioner of income, excess-profits and war-profits taxes for the years herein set forth, together with refunds allowed and paid.

12. This is a suit of civil nature at law and the cause of action herein set forth arises under the laws of the United States providing for internal revenue.

Wherefore, petitioner demands judgment against the defendant in the sum of $32,719.17, with interest on the sum of $12,719.17 from March fifteenth, 1919; with interest on $10,000.00 from August first, 1920; and with interest on $10,000.00 from August first, 1921, or such other sum as is legally proper and refundable to petitioner, and the costs and disbursements of this action.

HENRY PRENTISS & COMPANY, INC.,
By MARSHALL PRENTISS, *Treasurer.*

JEFFERY & REDMOND, Esqs.,
Attorneys for Petitioner.

Office & P. O. address, 14 Wall Street, Borough of Manhattan, New York City.

8 *Schedule A to petition*

1918

Paid: June 16, 1919			$535,144.20
" December 28, 1920			119,191.19
			$654,335.39
Refunded:			
" October 30, 1924	$4,025.68		
" October, 1926	4,452.96		
			8,478.64
Net paid			$645,856.75

1919

Paid: March 15, 1920	$10,843.81
" June 15, 1920	10,843.81
" September 15, 1920	10,843.81
" December 15, 1920	10,843.81
	$43,375.24
Refunded: October, 1926	523.57
Net paid	$42,851.67

1920

Paid: March 15, 1921	$23,066.35
" June 15, 1921	23,066.35
" September 15, 1921	23,066.35
" December 15, 1921	23,066.35
Total paid	$92,265.40

9 [*Duly sworn to by Marshall Prentiss; jurat omitted in printing.*]

10 In United States District Court

[Title omitted.]

Second cause of action to be inserted in the petition

FOR A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

Thirteenth. The petitioner repeats and realleges the allegations contained in paragraphs one, two, three, four, five, six, seven, nine, ten, eleven, and twelve of the petition.

Fourteenth. That pursuant to the statutes of the United States made and provided, the petitioner filed claims for refund of income and excess-profits taxes illegally assessed and collected for the years 1918 and 1919.

Fifteenth. That said claims for refund did not specifically request the inclusion of the said sum of $180,067.08 in the invested capital of petitioner under section 326 of the revenue act of 1918; but thereafter certain proceedings were had before the Commissioner of

11 Internal Revenue in connection with said claims for refund during which the petitioner submitted to the Commissioner of Internal Revenue full and detailed facts to show that the petitioner was entitled to the inclusion of said sum of $180,067.08 in its invested capital and claimed that it was entitled, under section 326 of the revenue act of 1918, to the inclusion of said amount in its invested capital; that the Commissioner of Internal Revenue considered said claim and rejected it, not because of any failure of the said claims for refund to request the inclusion of said sum in invested capital, but because he claimed that under the law and upon the merits, the petitioner was not entitled to the inclusion of said sum in its invested capital.

Sixteenth. That by reason of the premises, the said Commissioner of Internal Revenue waived any objection to the sufficiency of said claims for refund and waived compliance by petitioner with the provisions of the regulations of the Secretary of the Treasury requiring that all the facts relied upon should be clearly set forth in the claims for refund.

12 In United States District Court

[Title omitted.]

Amended answer

The United States of America, by Charles H. Tuttle, United States attorney for the Southern District of New York, answers the petition and complaint herein, as follows:

First. Admits each and every allegation contained in paragraphs 2, 3, 4, and 5 of the petition herein.

Second. Admits that in computing the income and excess-profits and war-profits taxes due from the petitioner for each of the three years ending December 31, 1918, December 31, 1919, and December 31, 1920, Commissioner of Internal Revenue refused to include in the invested capital of the petitioner the sum of $55,067.08 and also refused to include in invested capital the sum of $1,400,000; except as so admitted, it denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 6 paragraph of the complaint.

13

Third. Denies each and every allegation set forth in paragraphs 7 and 10.

Fourth. Denies that petitioner duly filed claims for refund for the calendar years 1918 and 1919, seeking the inclusion of the sum of $180,067.08 in invested capital for said years, and except as herein expressly denied, defendant admits each and every other allegation set forth in the 8 paragraph of the petition herein.

Fifth. Denies so much of paragraph 9 of the petition as purports to allege that claim for refund for the calendar years 1918 and 1919 for the inclusion of the sum of $180,067.08 in invested capital were ever denied by the Commissioner of Internal Revenue, it being the defendant's contention that claims requesting such relief were never filed, and except as herein denied, defendant admits the allegations of paragraph 9 of the petition herein.

FOR A FIRST, SEPARATE, AND DISTINCTIVE DEFENSE WITH RESPECT TO THE PETITIONER'S CLAIM FOR REFUND FOR THE CALENDAR YEAR, 1919

Sixth. That the petitioner's claim for refund for the calendar year 1919 requesting an additional deduction from income in the amount of $13,094.64 was allowed by the Commissioner of Internal Revenue on July 23, 1926.

14 Wherefore, the United States of America, defendant herein, demands judgment dismissing the complaint and petition, together with the costs and disbursements of this action.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

Office and post-office address, U. S. Courts and P. O. Building, Borough of Manhattan, city of New York.

[*Duly sworn to by Leon E. Spencer; jurat omitted in printing.*]

15 In United States District Court, Southern District of New York

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Judgment

The above-entitled action having been regularly on the the calendar of this court, and having come on for trial before Hon. Francis G. Caffey, district judge, on the 28th day of February, 1930,
16 in the United States court room, old Post Office Building, in the Borough of Manhattan, city of New York, and the petitioner having appeared by Jeffery & Redmond, its attorneys, Joseph F. Murray and William P. Jeffery, of counsel, and the defendant having appeared by Charles H. Tuttle, United States attorney, Leon E. Spencer, assistant United States attorney, of counsel, and the parties having presented their proofs, and the court having duly made its report, and having duly made its findings of fact and conclusions of law, dated January 20, 1931, directing judgment in favor of the petitioner and against the defendant, for the sum of $7,975.21, together with interest according to law on said sum:

Now, on motion of Jeffery & Redmond, attorneys for the petitioner, it is adjudged that the petitioner, Henry Prentiss & Company, Inc., do recover of the defendant, United States of America, the sum of $7,975.21, with interest thereon according to law.

Judgment this 20th day of February, 1931.

CHARLES WEISER, *Clerk.*

17 In United States District Court, Southern District of New York

L. 40/387

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Joint bill of exceptions

Before Hon. FRANCIS G. CAFFEY, J.

NEW YORK, *February 28, 1930.*

Appearances:

Jeffery & Redmond, Esqs., for the plaintiff; William P. Jeffery, Esq., and Joseph F. Murray, Esq., of counsel.

Charles H. Tuttle, Esq., for the defendant, by Leon E. Spencer, Esq., assistant U. S. attorney.

WILLIAM P. JEFFERY, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. MURRAY:

Q. You are one of the attorneys for the plaintiff, Mr. Jeffery?—A. I am.

18 Q. And have you been attorney for the Henry Prentiss & Company, Inc., for a considerable time?—A. For the Henry Prentiss & Company, Inc., and the predecessor company something over 25 years.

Q. And are you familiar with the organization of the plaintiff?—A. I am.

Q. Will you briefly tell the court about the organization of the plaintiff, and the acquisition of the properties of the predecessor corporations?—A. The predecessor corporation was the Prentiss Tool & Supply Company, which was organized about 1878. The new corporation, the plaintiff in this action, was organized the latter part of August, 1916, originally with a capital of $10,000.

The COURT. The new company?

The WITNESS. Yes; the new company.

A. (Continuing.) There was transferred the latter part of August, 1916, from the old company some shares of Atchison shares of stock which stood on the books at $10,000, which had a book value of $10,000, approximately, and an actual value of $10,000. For this the new company issued all of its capital stock, $10,000.

About the next day the capital of the plaintiff was increased to $500,000. Resolutions were adopted by both companies under which the old company, the officers of the old company, were instructed to transfer all of the business property and assets of the old com-

pany, including the name, good will, contracts, and like tangibles, and to receive therefor $490,000 par value of the capital stock of the new company.

19 The new company adopted similar resolutions and the officers were instructed to acquire all of the tangible assets and the good will, contracts, and so forth, of the old company, and to issue $490,000 par value of stock. This was carried out. The transfer was made, and the stock was issued, as I have outlined.

I have copies of the resolutions. I do not know whether you want to put them in.

Mr. MURRAY. We have stipulated that the resolutions that are here, your honor, may go in without proving them by the officers of the corporations.

The COURT. You will make the stipulation a part of the record.

Mr. MURRAY. Yes.

Q. What was the value of the assets acquired by the plaintiff corporation from the predecessor corporation so far as the tangible properties were concerned?—A. The book value of the tangible assets of the predecessor corporation at the time of the transfer amounted to the sum of $1,016,466.66. This was subdivided, or rather consisted of cash, receivables, inventory, some securities, investments, and real estate subject to debts for about the figure given before.

The actual value of the property acquired was the same in all cases with the exception of real estate, which, it has been stipulated for this action, had an actual value of $81,000 on September 1, 1916. The book value of real estate amounted to——

(Mr. Murray hands paper to the witness.)

20 A. (Continuing.) $34,628.92. The difference between the book value and the actual value of real estate is $46,371.08. Adding the book value and the excess value of real estate gives a total value, actual value for tangibles acquired by the plaintiff corporation, of $1,062,837.74.

The COURT. In the $1,016,466.66?

Q. In the $1,016,466.66 you had included the $10,000 value of stock?—A. Yes. The above book total was the amount on the books prior to the transfer of $10,000 Atchison, Topeka and Santa Fe stock; deducting this $10,000, for which 100 shares were specifically issued, leaves a balance of tangibles of $1,052,837.74 tangibles acquired in the final transfer.

Mr. SPENCER. I will state that on the books of the predecessor company there was no sum carried for good will. The plaintiff company took over the property of the predecessor company, entered on its books the assets exactly as they previously appeared on the predecessor company. There was no closing of the books of the old and the opening of the books of the plaintiff company except the adjustment in connection with the amount of capital and the amount of surplus. The new company, the plaintiff, did not enter any amount on its books for good will at any time.

I did not mean in my previous statement that good will was entered on the books. I did not mean to vary the books, but I mean
21 simply to state, according to the stipulation, the value of good will acquired was $300,000.

Q. With these figures, Mr. Jeffery, will you compute, or have you computed, the proportion which the tangibles bear to the total values, and the proportion which the intangibles, the value of the intangibles bear to the total values?—A. I have. The total tangibles and intangibles acquired amounted to $1,352,837.74.

Q. That is, including in that the $300,000 value of good will which we have stipulated?—A. Yes; the $300,000, the value previously stated for good will, is 22.2 per cent of the total tangibles and intangibles acquired. The amount of stock issued for the above aggregate of tangibles and intangibles had a par value of $490,000.

I think there was a mistake in the minutes where the value of good will, $300,000, or rather where 22.2 per cent was stated to be the proportion of tangibles and intangibles to the total acquired; it should be 22.2 per cent is the proportion of intangibles to the total acquired.

The COURT. You mean by good will all intangibles?

The WITNESS. All intangibles; yes.

A. (Continuing.) The computation: The total stock issued for the above tangibles and intangibles was $490,000 par value; 22.2 per cent of $490,000 is $108,780; 77.8 per cent is $318,000.

Q. Have you computed, Mr. Jeffery, what the tax would
22 have been payable by the taxpayer for the year 1918 if there had been included in invested capital for that year the actual value of real property as of September 1, 1916, the book value of September 1, 1916, plus the increased value which has been stipulated should be included, together with the sum of $107,500 for intangibles?—A. I have.

Q. Will you state what that computation is?—A. Invested capital as heretofore found by the Commissioner of Internal Revenue for the year 1918 was $1,521,947.97. In arriving at this total real estate was included in the sum of $34,628.92. The actual of real estate as of September 1, 1916, as per stipulation, was $81,000, divided at $23,000 to land, and $58,000 to building. I have reduced the value of the building for depreciation from September 1, 1916, to January 1, 1918, at the rate of 3 per cent. This would make a reduction of $2,300, leaving a residue value of January 1, 1918, for real estate of $78,700; deducting from this the amount previously allowed by commissioner for real estate would leave an additional invested capital from real estate of $44,071.08; adding to this $107,500 for good will or intangibles——

A. (Continuing.) $107,500, as stipulated, would give an adjusted or corrected invested capital on the above computation of $1,673,519.05.

In the above computation real-estate depreciation at 3 per cent for the year 1918 amounted to $1,725. In the income as found by

commissioner no depreciation had been charged against real estate, but in the above computation is charged for the purpose of determining the 1918 value.

23 The income, the net income as heretofore determined by the commissioner for the year 1918, is $951,058.74; if depreciation, $1,725, is deducted from the amount previously given, the net income would be $949,333.74.

Based upon corrected income and invested capital, as stated above, a calculation of the books—a calculation of the excess profits and income tax would show a total tax of $632,684.20. The amount of tax which has been paid by the plaintiff for the year 1918 was $644,776.20, and excess-profits tax based upon the above computation of $12,092.

Q. When were the taxes paid for 1918?

Mr. SPENCER. Just a minute. May I interrupt there for a moment? Of course, it is understood that Mr. Jeffery's testimony is his opinion of what the computation would be.

Mr. MURRAY. Yes.

Mr. SPENCER. I am not conceding that his computation is correct.

Mr. MURRAY. That is right.

Q. When were the taxes for 1918 paid?—A. $535,000 taxes were paid in quarterly installments during 1919. There was an additional assessment of 119,000 some odd dollars made and paid November 28, 1920. I have made an interest computation from the latter date, November 28, 1920; computed from that date to February 15 of this year at the rate of six per cent, the interest on the above excess of $12,092 would be $6,680.83.

24 Q. Now, have you computed for the year 1920, Mr. Jeffery, based upon these inclusions for real property and good will?—A. Yes; in order to do that, it is necessary to compute 1919, because the adjustment for one year affects subsequent years.

Q. Have you done that?—A. I have. I do not know whether you want me to give the matter in complete detail.

The COURT. I think you better do that.

A. (Continuing.) Or you may prefer to put it in memorandum form.

A. (Continuing.) Invested capital as heretofore found by commissioner amounted to $1,975,043.33.

Q. This was 1919?—A. This was 1919. The excess value of real estate for 1918, as previously stated, amounted to $44,071.08. From this I deduct $1,725, representing depreciation of 3 per cent during 1918. This would leave an excess value of real estate over the amount previously allowed, or allowed by the commissioner of $42,346.08. To this I add good will $107,500. I have made a further addition of invested capital of $5,110.08.

This amount is 42 2%00 per cent of the principal amount of over-assessment for 1918. I will express it as over-assessment for 1918. This percentage is a percentage heretofore used by the Commissioner

of Internal Revenue in charging invested capital with 1918 taxes, charging 1919 invested capital with 1918 tax. The total of these adjustments is $154,956.16.

25 Adding this to the invested capital previously found by commissioner would produce an adjusted investment capital of $2,129,999.49.

In the above invested-capital adjustment depreciation has been taken on the corrected values, $1,725. Depreciation actually taken and heretofor allowed as a deduction from income for 1919 was $1,308.35. The proper depreciation on the new value—this is $416.65 less than the proper 3 per cent depreciation on the corrected value. Deducting the excess depreciation from income as heretofore found will leave an adjusted net income of $269,450.47.

A computation of excess-profits and income taxes on the above adjusted figures shows a total tax of $40,503.64. The tax heretofore assessed and paid is $42,851.67, showing an excess of taxes paid, according to the above computation, of $2,348.03.

If you compute interest on this as the 1919 claim is withdrawn——

The COURT. This is for 1919?

A. (Continuing.) Yes; 1919. The 1919 computation is only material because of the effect on 1920 invested capital adjustment.

For the year 1920 the invested capital as found by the commissioner is $1,583,933.72.

The real estate, the excess value of real estate, for 1919, as previously testified, was $42,346.08. I have deducted from this depreciation for the year 1919 at 3 per cent on corrected value. This depreciation amounts to $1,725, leaving a residue value—residue excess value of $40,621.08.

26 I think I have made a slight error in that, because I have assumed that the commissioner has heretofore allowed $32,000, or rather $34,628.92, for real-estate invested capital. As a matter of fact, for 1920 some depreciation had been taken, and the amount heretofore allowed was somewhat less, so this calculation is subject to that minor correction.

To the above excess value for real estate I have added good will, $107,500.

I have added the entire 1918 overassessment, which I previously computed at $12,092. I have added the same proportion of the 1919 overassessment as previously had been deducted by the commissioner, $992.28.

This makes a total adjustment, or additions to invested capital, of $161,205.36. Adding this sum to the invested capital as previously determined by the commissioner produces a total adjusted invested capital of $1,745,139.08.

The income as heretofore found by commissioner for 1920 amounted to $382,858.32. Depreciation taken during 1920, based upon old values, was $785. The rate for depreciation being heretofore used in this calculation is $1,725, a difference of $940. If this

difference is deducted from income, the adjusted net income would be $381,918.32. The income in excess and profit tax computed for 1920, computed on the above adjusted income and invested capital, would be $83,701.05.

The total tax heretofore assessed and paid is $92,265.40, an excess paid of $8,564.35.

The tax heretofore paid for the year 1920 was paid in four
27 installments, March 15, June 15, September 15, and December 15, 1921. I have taken an average date—I think August 1, but I am not sure of the date—from such average date to February 15, 1930. Interest calculated at 6 per cent is $4,363.93. That is subject to a minor correction. As heretofore stated, there is some minor correction to be made in connection with the adjusted value of real estate, but it is very small.

Mr. MURRAY. If the court please, I wish to offer in evidence some papers here, the 1918 tax return of the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 1.")

Mr. MURRAY. I offer in evidence the 1920 tax return of the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 2.")

Mr. MURRAY. The 1918 refund claim.

The COURT. Any objection?

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 3.")

Mr. MURRAY. I offer in evidence the income-tax return for 1919, solely for computation purposes, your honor.

(Marked "Plaintiff's Exhibit 4.")

The COURT. Have you the refund claim for 1920?

28 Mr. MURRAY. Yes, your honor; but I will offer them in order.

Do you consent, Mr. Spencer, or will you stipulate that the 1918 refund claim was duly filed, this particular one (Exhibiting to Mr. Spencer)?

Mr. SPENCER. There is no question as to the date, the correctness of the date of filing of that claim.

Mr. MURRAY. I offer a letter dated May 13, 1924, from the Treasury Department.

The COURT. To the taxpayer?

Mr. MURRAY. To the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 5.")

Mr. MURRAY. I offer a letter dated June 23, 1924, from the Treasury Department to the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 6.")

Mr. MURRAY. Now I asked Mr. Spencer to produce a brief and application for relief in support of claim for refund 1918, dated June 26, 1924. Mr. Spencer says he has not got this instrument. Will you consent to the admission in evidence of this copy, Mr. Spencer (handing to Mr. Spencer)?

Mr. SPENCER. My objection to the admission of this will not
29 be that it is a copy. However, if the taxpayer offers it as an amendment to the claim for refund as originally filed, I must object. If he offers it as containing additional data to support the plaintiff's claim for refund, I will consent to its admission.

Mr. MURRAY. Well, I did not have in mind offering it as an amendment to the original claim for refund. My purpose solely is in showing what transpired before the Commissioner of Internal Revenue so that the court might properly see whether there was any basis for the claim that the commissioner had before it facts sufficient to decide whether or not we were entitled to the relief. I do not like the limitation of Mr. Spencer, although I cannot see just now what harm it would do to have it go in on that basis.

The COURT. I will overrule the objection and the defendant may have an exception. I will receive it without passing on what effect it may have.

(Marked "Plaintiff's Exhibit 7.")

Mr. MURRAY. I offer in evidence letter dated June 26, 1925, from the Treasury Department to the taxpayer.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 8.")

Mr. MURRAY. I offer in evidence letter dated July 16, 1925, from the Treasury Department to the taxpayer.

30 Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 9.")

Mr. MURRAY. I offer letter dated February 23, 1926, from the Treasury Department, Solicitor of Internal Revenue, to the taxpayer.

Mr. SPENCER. I understood you to say letter from the Treasury Department; I suggest that you correct it, and say from the Commissioner of Internal Revenue. No objection then.

(Marked "Plaintiff's Exhibit 10.")

Mr. MURRAY. I offer letter of March 3, 1926, from the Solicitor of Internal Revenue to the plaintiff.

Mr. SPENCER. If your honor please, this is a letter written by the Solicitor of Internal Revenue, Department of Justice, to the Henry Prentiss & Company. In so far as this letter attempts to in any way bind the Commissioner of Internal Revenue, or to indicate that he had before him in his office any request from the taxpayer looking toward a review of the general question of taxes due for '18 and '19——

Mr. SPENCER. I will object to it in so far as it is a letter from the solicitor's office to the taxpayer. This may be one of several letters written by other departments where other departments had

agreed to consult the taxpayer concerning various phases
31 of his claim. I do not want that considered as the filing, or leading toward the filing of an amended claim for refund, because it had nothing to do with the commissioner's office in connection with it at all. They simply made application for some consideration, and they were told they would hear from them.

Mr. MURRAY. Well, this letter, so far as I am concerned, is clear that it must be taken in conjunction with Exhibit 10, the letter of February 23, where the solicitor wrote on the stationery of the Commissioner of Internal Revenue, "that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919 your application for special assessment. Some question has arisen as to the denial of special assessment. Before a final decision is reached you will be granted an opportunity to be heard orally if you so desire," and the letter of March 3, 1926, is in connectio nwith this oral hearing. It sets it down for an oral hearing for March 15.

Mr. SPENCER. That appears to be the case in the letters; however, even if that is so you have not any objection to that going in as being from the Solicitor of Internal Revenue, Department of Justice, as it purports to be.

Mr. MURRAY. Oh, no; no.

(Marked "Plaintiff's Exhibit 11.")

32 Q. Mr. Jeffery, did you appear in Washington on March 15, 1926?—A. I did.

Q. Where did you appear?—A. I saw Mr. Lansforth at the solicitor's.

Q. And this was in connection with the 1918 refund claim of the plaintiff?—A. Yes; we previously received a letter that his office had had the matter before him, and an appointment was made and I went down to see him.

Q. I show you this Exhibit 11, and ask you whether it was in pursuance of that letter that you appeared on March 15, 1926 [handing to the witness]?—A. Yes; there was a previous letter in which he first brought the matter of my attention.

Q. That is Exhibit 10 [handing to the witness]?—A. Yes; that initiated this conference with Mr. Lansforth.

Q. Briefly, will you state what transpired at that hearing on March 15.

Colloquy between court and counsel

Mr. SPENCER. If your honor please, if Mr. Murray wants testimony which would amount to an amended claim for refund, or any variation of the claim for refund as filed, I must object to the testimony for the reason that the Revised Statutes, section 3226, and the regulations enacted thereunder, provide how claim for refund shall be filed, and what it shall state; in other words, it shall state all the grounds upon which the taxpayer relies, and all the facts necessary

for a determination by the Commissioner of Internal Revenue
33 of a claim for refund. If the testimony is going to be to substantiate the claim for refund, I have no objection; if it is to be at variance, or to amend the claim, I must object to the testimony.

Mr. MURRAY. Well, we have not sued on any amended claim. We have sued on the original claim as taken, with an additional, second claim now that there was a waiver of any objection to the sufficiency of that original claim, and the purpose of the testimony is to controvert the Government's allegations that this question was never considered, the question of the inclusion in invested capital of these additions.

Mr. SPENCER. If your honor please, referring again to the claim for refund for the calendar year 1918, there is nothing in that claim for refund which requests any relief in the line of increased invested capital. It requests relief under sections 327 and 28 of the revised act of 1918, and if the testimony is to show that they requested relief from the commissioner under section 326 of the revenue act of 1918, then it will be irrelevant and immaterial, because it conflicts with the law and regulations requiring claims to be in writing and under oath.

Mr. MURRAY. Now, on this point of its being in conflict with the regulations, your honor, I at this time desire to call the court's attention to the fact that the regulations in effect at the time,
34 during all this period between 1918 and 1926, the regulations provided as to claims for refund, that all the facts relied upon in support of the claims should be clearly set forth under oath—all the facts.

Now I call the court's attention to the fact that in 1929 the regulations were amended so as to require the statement of the grounds for a refund as distinguished from the facts. Now all the regulations required at the time were the facts.

Mr. SPENCER. I wish to say something on that point.

Afternoon session

Mr. MURRAY. Your honor, I offer in evidence application for refund and relief, dated April 8, 1926.

The COURT. That is 1920?

Mr. MURRAY. That is 1918, your honor.

(Marked "Plaintiff's Exhibit 12.")

Mr. MURRAY. It is stipulated, your honor, that this application was filed with the office of the Commissioner of Internal Revenue on or about April 12, 1926.

The plaintiff and the defendant are stipulating as to the closing balance sheet of Prentiss Tool & Supply Company as of August 31, 1916, and as to the opening balance sheet of Henry Prentiss & Company as of September 1, 1916.

And it is further stipulated that anything that Mr. Jeffery
35 might testify to, might have stated as to figures contained in such balance sheets, that if such statements are contradictory of the figures in such balance sheets as stipulated, that the figures in the balance sheets as stipulated shall control.

Mr. SPENCER. Mr. Jeffery will be here in a moment. In the meantime, I will make this statement for the court: In so far as the testimony of Mr. Jeffery states any method of computation of any tax, I renew my motion to strike out that testimony from the record as being entirely extraneous as a matter of evidence; in other words, in these internal-revenue cases the computation, strictly speaking, forms no part of the record.

The COURT. I shall so understand it.

Mr. SPENCER. It is for the purpose of the record; if it ever goes up, then I make this motion.

The COURT. It is merely helping me. The theory I have to make myself, and I shall so understand.

Mr. SPENCER. In so far as the testimony of Mr. Jeffrey states his method of computation, does your honor rule that that should not be considered a part of the record, or should be stricken out, or will you leave it in?

The COURT. I am going to leave it in.

Mr. SPENCER. You will give me an exception, because there has been criticism in various cases because it has not been taken.

The COURT. Yes.

36 WILLIAM P. JEFFERY resumes the stand.

Direct examination resumed by Mr. MURRAY:

Q. I show you Exhibit 10, which is a letter from the Solicitor of Internal Revenue, dated February 23, 1926, and ask you whether between July 16, 1925, and the date of that letter you had been in communication in respect of Prentiss Company tax matters for 1918 with the Solicitor of Internal Revenue, or the Commissioner of Internal Revenue (handing to witness)?—A. No.

Q. So this letter came unsolicited from Washington, did it?—A. (No answer.)

Q. Now, I understand that you appeared at the office of the Solicitor of Internal Revenue on March 15, 1926, for a hearing of the taxpayer's 1918 claim for refund?—A. I do not recall the exact date, but it is approximately that time, following the letter of February 23.

Q. Well, does that Exhibit 11 refresh your recollection as to the date of the hearing (handing to witness)?—A. Well, I would say it was about that date, or near to it.

Q. Whom did you see representing the solicitor on that date?—A. Mr. Lansforth of the solicitor's office.

Q. Will you state what conversation was had between you and Mr. Lansforth at that time?

Mr. SPENCER. Wait just a minute. I object to that question, your honor, on the ground that this evidence is incompetent, irrelevant, and immaterial in that whatever he said, whatever conversa-
37 tions he had with the Solicitor of Internal Revenue, and whatever statements the Solicitor of Internal Revenue may have made to him with reference to the liability of Henry Prentiss & Company, Inc., for any taxes are absolutely extraneous to the question here. He is attempting to get evidence which purports to effect the claim for refund. A claim for refund must be filed in a certain way, must be in writing, must state certain grounds. Whatever Mr. Jeffery testifies can not show what the claim for refund was, or what the claim contained.

The COURT. What is your theory?

Mr. MURRAY. My theory is this, your honor, that the main, or one of the principal objections which the Government now raises is that the question of the right to include in invested capital these amounts for good will and value of real estate was not considered by the Commissioner of Internal Revenue, and this testimony goes to the question of whether that question was considered by the Commissioner of Internal Revenue, and if it was considered, it is in support of my contention that the Commissioner of Internal Revenue waived any defect of form rather than substance in the claim for refund.

The COURT. Objection sustained; you may note your exception.

Q. There has been offered in evidence as Exhibit 12 an application for refund and relief dated April 8, 1926, Do you know
38 whether that was filed with the Solicitor of Internal Revenue (handing to witness)?—A. I do.

Q. Do you know approximately when it was filed?

The COURT. Filed with the commissioner?

Mr. MURRAY. With the Solicitor of Internal Revenue.

A. It was filed at the second hearing I had before Mr. Lansforth, a few days after this is dated; this is dated April 8, 1926, and the hearing was on April 12, 1926, and that was the date I filed it.

Q. In other words, after the hearing of March 15 there was another hearing had before Mr. Lansforth?—A. There was, on April 12.

Q. Between the hearing of March 15 and the hearing of April 12, 1926, this application was prepared?—A. Yes.

Colloquy between court and counsel

Mr. MURRAY. I assume, your honor, that the same ruling would be made as to any conversations at any other time with Mr. Lansforth?

The COURT. Yes.

Mr. MURRAY. Have you the 1920 refund claim?

(Mr. Spencer produces.)

Mr. MURRAY. I offer in evidence taxpayer's 1920 refund claim.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 13.")

39 Mr. MURRAY. I offer in evidence letter dated September 25, 1926, from the Treasury Department, Commissioner of Internal Revenue office, to the taxpayer denying the taxpayer's 1920 claim for refund.

The COURT. Any objection?

Mr. SPENCER. All right; no objection.

(Marked "Plaintiff's Exhibit 14.")

Mr. MURRAY. If the court please, I offer in evidence the defendant's original answer filed on this action.

The COURT. Any objection?

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 15.")

Mr. SPENCER. If your honor please, is it not the fact that these pleadings form a part of the record without introduction in evidence?

The COURT. Yes; but it is perfectly proper to put them in evidence.

Mr. MURRAY. A pleading which has been superseded.

The COURT. Yes.

(At this point the witness left the stand, with the consent of the court, to confer with counsel.)

Mr. SPENCER. No cross-examination.

Mr. MURRAY. Now, if the court please, if Mr. Spencer consents, I reserve the right to offer in evidence some two or three letters

40 from the Commissioner of Internal Revenue. I offer in evidence letter dated September 17, 1925, from the Commissioner of Internal Revenue to the taxpayer showing the determination by the commissioner of the taxes due by the taxpayer for the years 1918 and 1919. You see, there was certain assessment, overassessment, and we need this in order to finally compute.

Mr. SPENCER. No objection.

(Marked "Plaintiff's Exhibit 16.")

Mr. MURRAY. Now, there are two other letters, your honor, which seem to have been mislaid, which I will reserve the right to offer in evidence with Mr. Spencer's consent or we may stipulate those.

The COURT. If stipulated as to those, we won't have to have them. When produced they will be marked "Exhibits 17 and 18."

Mr. MURRAY. The plaintiff rests, your honor.

Mr. SPENCER. If your honor please, I offer in evidence the final balance sheets of Henry Prentiss & Company, Inc., for the year 1918.

The COURT. For what year?

Mr. SPENCER. 1918.

Mr. SPENCER. For the years ending December 31, 1917, and December 31, 1918.

The COURT. Any objection?

Mr. MURRAY. I object, your honor, on the ground that this assumes only to be an auditor's report, and the balance sheets

41 for 1918 are already in evidence attached to the return for the year 1918.

Mr SPENCER. If your honor please, this is a copy of the balance sheet, a copy of the books of Henry Prentiss & Company made by the taxpayer's own accountants, certified by them, and whether or not they are exactly the same as the return indicates I am not at this time able to say, but I can see no objection to the submission of their own auditors' report of their books and accounts.

Mr. MURRAY. It just encumbers the record; it is in twice.

Mr. SPENCER. Not all of it.

The COURT. Well, I can not tell.

You are not objecting on the ground that it is incompetent?

Mr. MURRAY. No.

The COURT. Received; objection overruled.

(Marked "Defendant's Exhibit A.")

Mr. SPENCER. I offer in evidence balance sheet of Henry Prentiss & Company for the year ending December 31, 1919.

Mr. MURRAY. The same objection.

The COURT. The same ruling.

(Marked "Defendant's Exhibit B.")

Mr. SPENCER. I offer in evidence balance sheet of Henry Prentiss & Company, Inc., for the calendar year ending December 31, 1920.

Mr. MURRAY. The same objection.

The COURT. The same ruling; Exhibit C.

(Marked "Defendant's Exhibit C.")

42 In United States District Court

[Title omitted.]

Stipulation of facts

It is hereby stipulated and agreed as follows:

First. That the copies of the resolutions of Prentiss Tool & Supply Company and of Henry Prentiss & Company, Inc., annexed hereto, may be offered in evidence with the same force and effect as though they had been proved by the proper officers of said companies.

Second. That the property and assets mentioned in said resolutions were transferred to Henry Prentiss & Company, Inc., pursuant to and as provided in said resolutions.

Third. That Henry Prentiss & Company, Inc., issued and delivered its capital stock to the persons and in manner provided in said resolutions.

Fourth. That included in the property and assets acquired
43 by the plaintiff from Prentiss Tool & Supply Company was certain real estate consisting of land and a warehouse located in Jersey City, New Jersey, which was owned by plaintiff during the years 1918, 1919 and 1920.

Fifth. That the Commissioner of Internal Revenue, in computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31st, 1918, December 31st,

1919, and December 31st, 1920, included in the invested capital of plaintiff for each of said years, only the sum of $34,628.92 as the actual value of said real estate.

Sixth. That the actual value of said real estate on September 1st, 1916, was $81,000.00, divided as follows, land value $23,000.00 and building value $58,000.00.

Seventh. That in computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31st, 1918, December 31st, 1919, and December 31st, 1920, the Commissioner of Internal Revenue did not include in and as invested capital any sum for intangible property, including name, good will, contracts, and rights.

Eighth. That the actual value of intangible property acquired by the plaintiff, including name, good will, contracts, and rights, was on September 1st, 1916, in excess of the sum of $300,000.00.

Ninth. That in the event that the court determines, in this
44 action, that the plaintiff is entitled to the inclusion in invested capital of any amount for intangible property, the amount thereof shall be taken and fixed at $107,500.00.

Tenth. That plaintiff withdraws any claim for refund on account of taxes assessed against and paid by plaintiff for the year 1919.

Eleventh. That nothing in this stipulation shall be construed as an admission on the part of the defendant that the plaintiff is entitled to the inclusion in invested capital of any amount for intangible property.

JEFFERY & REDMOND,
Attorneys for Plaintiff.
CHARLES H. TUTTLE,
Attorney for Defendant.

Dated, New York, February 26th, 1930.

45 *Resolutions annexed to statement of facts*

[Extract from minutes of meeting of the incorporators and subscribers of Henry Prentiss & Company, Inc., held August 17, 1916]

RESOLVED, That this company be authorized to purchase 100 shares of the Atchison, Topeka & Santa Fe Railway Company of the par value of $10,000 and to pay therefor the sum of $10,000 and to issue stock of the company of the par value of $10,000 and deliver the same in payment thereof in lieu of cash, provided, in the opinion of the board of directors, said stock is reasonably worth the sum of $10,000.

[Extract from minutes of meeting of directors of Henry Prentiss & Company, Inc., held August 17, 1916]

RESOLVED, That the board of directors of this company is of the opinion that the 100 shares of stock of Atchison, Topeka & Santa Fe Railway Company offered for sale to this company are reasonably

worth the sum of $10,000, and the officers of the company are hereby authorized, empowered, and directed to purchase said stock for $10,000 and to issue stock of this company of the par value of $10,000 in full payment therefor.

RESOLVED, That the incorporators and subscribers, having waived their rights to the stock of this corporation, according to their
46 subscriptions, as appears from the certificate of incorporation, the stock so subscribed for by the incorporators and subscribers be issued as part of the purchase price of the 100 shares of stock of the Atchison, Topeka & Santa Fe Railway Company hereinbefore authorized to be purchased.

[Extract from minutes of special meeting of the stockholders of Henry Prentiss & Company, Inc., held August 25, 1916]

RESOLVED, That this company purchase the business property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000, and to issue stock of the company of the par value of $490,000 and deliver the same in payment thereof in lieu of cash, provided, in the opinion of the board of directors, such property is reasonably worth the sum of $490,000.

[Extract from minutes of meeting of board of directors of Henry Prentiss & Company, Inc., held August 25, 1916]

The secretary then stated that this company was originally organized with an authorized capital of $10,000, and that thereafter the capital stock was increased to $500,000, consisting of 5,000 shares of the par value of $100 each; that all the steps required by law for the increase of the capital stock had been completed.

47 The chairman then stated that the Prentiss Tool & Supply Company, a New York corporation, had offered to sell, assign, and transfer to this company all its business, property, and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000.

On motion duly made and seconded, the following resolution was unanimously adopted:

"Whereas, the Prentiss Tool & Supply Company, a corporation organized under the laws of the State of New York, has offered to sell, assign, and transfer to this company all its business, property and assets, real and personal, including name, good will, contracts and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000, and is willing to accept stock of this company of the par value of $490,000 in lieu of cash; and

"Whereas, by a resolution adopted at a meeting of the stockholders of said company the purchase of said business on said terms was authorized, provided the same was, in the opinion of the board of directors of this company, reasonably worth the sum of $490,000; and

"Whereas, the board of directors of this company is, after examining into the value of said business and property, of the opinion
48 that the same is reasonably worth the sum of $490,000 and it is necessary for the business of this company, and that it is to the interest of this company to purchase the same.

"Now, therefore, be it

"RESOLVED, That this company purchase from the Prentiss Tool & Supply Company the business of the said company, together with all its property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, and pay therefor the sum of $490,000, and upon receipt of sufficient deeds, assignments, and transfers of property as this company may by its counsel be advised are necessary and proper the officers of this company are hereby authorized, empowered, and directed to issue to the Prentiss Tool & Supply Company, or its assigns, stock of this company of the par value of $490,000 in full payment therefor.

"RESOLVED, That upon the payment to this company by the Prentiss Tool & Supply Company of its funds on deposit with any bank, trust company, or banking institution, any such bank, trust company and banking institution is authorized and empowered to pay and charge against the account of this company such checks of the Prentiss Tool & Supply Company as may be presented for payment.

"RESOLVED, That this company shall, and it hereby does, as-
49 sume all of the debts, liabilities, and obligations of the Prentiss Tool & Supply Company, and agrees to pay the same according to the liability of the Prentiss Tool & Supply Company, and in all respects to perform and carry out all contracts and business engagements of the said Prentiss Tool & Supply Company according to the liability and obligation of such company."

[Extracts from minutes of meeting of stockholders of Prentiss Tool & Supply Company, held August 25, 1916]

Whereas, Henry Prentiss & Company, Inc., was organized, and its capital increased to the sum of $500,000, for the purpose of taking over the business, property and assets of this company, subject to its obligations, and it is to the interest of this company to transfer its said property to the said Henry Prentiss & Company, Inc., in return for all of its capital stock,

Now, therefore, be it

RESOLVED, That the act of the officers of this company in selling to Henry Prentiss & Company, Inc., 100 shares of the stock of the Atchison, Topeka & Santa Fe Railway Company for 100 shares of the capital stock of said Henry Prentiss & Company, Inc., be, and the same hereby is, ratified, confirmed, and approved.

FURTHER RESOLVED, That the Directors of this company be,
50 and they hereby are, authorized and empowered to sell the business, property, and assets, real and personal, of this company, including name, good will, contracts, and rights of every char-

acter and description, subject, however, to its debts and obligations, for the sum of $490,000 to Henry Prentiss & Company, Inc., and to accept in lieu of cash therefor all of the remaining capital stock of Henry Prentiss & Company, Inc., to wit, 4,900 shares, of the par value of $100 each, total $490,000.

FURTHER RESOLVED, That the Directors of this company are authorized to distribute pro rata among the stockholders of this company the stock of said Henry Prentiss & Company, Inc., and to direct the said Henry Prentiss & Company, Inc., to issue its stock according to such pro rata distribution.

[Extract from minutes of board of directors of Prentiss Tool & Supply Company, held August 25, 1916]

RESOLVED, That this company sell to Henry Prentiss & Company, Inc., its business property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000, and the officers of the company are hereby authorized to accept in lieu of cash therefor all the remaining capital stock of Henry Prentiss & Company, Inc., to wit, 4,900 shares of the par value of $100 each, total $490,000.

51 It was further

RESOLVED, That said 400 shares of stock of Henry Prentiss & Company, Inc., together with the 100 shares of stock heretofore issued in the names of Marshall Prentiss, George L. Wilson, and Charles A. Goodspeed, be distributed pro rata among the stockholders of this company. The officers of the company are hereby authorized, empowered, and directed to instruct the said Henry Prentiss & Company, Inc., to issue its stock according to such pro rata distribution as set forth in the letter of this company to Henry Prentiss & Company, Inc., dated August 15, 1916; the 100 shares of stock heretofore issued to Marshall Prentiss (50), George L. Wilson (25), and Charles A. Goodspeed (25) to be retained by them and to be their own property.

And it was further

RESOLVED, That the officers of this company be, and they hereby are, authorized and directed to execute and deliver to Henry Prentiss & Company, Inc., in exchange for said stock of said company, all assignments, deeds, bills of sale, or other documents of transfer to vest in said Henry Prentiss & Company, Inc., all rights and titile of this company in and to any and all of its property and rights.

RESOLVED, That any bank, trust company, and banking institution with which this company shall have an account is hereby authorized and requested to transfer, on September 1, 1916, to

52 the credit of Henry Prentiss & Company, Inc. only All outstanding checks of the Prentiss Tool & Supply Company which may be presented for payment shall, however, be paid out of this fund so transferred and charged to the account of Henry Prentiss & Company, Inc.

RESOLVED, That any checks, drafts, notes, or orders for the payment of money drawn to the order of or payable to this company are the property of Henry Prentiss & Company, Inc., and the same may be deposited to the account of said Henry Prentiss & Company, Inc., by any banking institutions with which said company may have an account, without endorsement of this company, and the endorsement of Henry Prentiss & Company, Inc., on any such check, note, draft, or order for the payment of money shall be sufficient and shall be binding upon this company.

53 In United States District Court, Southern District of New York

L. 40/387

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

UNITED STATES OF AMERICA, DEFENDANT

Opinion, Caffey, J., dated June 27, 1930

Though the action was tried last February, it was not argued or submitted until the 23rd instant. As explained to counsel, it is essential that I dispose of it this week, before leaving on vacation. After I resume sitting in September, my time will be absorbed by new matters. Accordingly, without attempting a full exposition of the grounds, the points involved are determined as follows:

1. If the excess of actual value of the real estate over the figures entered in the books and balance sheets had been claimed in the returns for 1918 and 1920, the taxpayer would have been entitled to include the item in invested capital. As I understand, this proposition is not seriously, if at all, disputed.

2. Similarly, within the limits urged in the complaint, the taxpayer would have been entitled to include the item of intangi-
54 bles in invested capital for those years. I think the corporate proceedings, recited in the stipulation, establish that the intangibles were part of the consideration paid for the $490,000 of capital stock when originally issued. As said in Doyle v. Mitchell (247 U. S. 179, 187) and in Isbell Porter Co. v. Commissioner of Internal Revenue (C. C. A. 2, April 7, 1930), the facts, and not the book entries, govern.

3. Whether the 1918 refund claim (Exhibit 3) included the real estate item or the intangibles item depends exclusively upon the significance to be attributed to the statement therein that there existed an abnormal condition in invested capital.

Possibly the two items rest on somewhat different bases. It is manifest that the real estate was under consideration. In a sense, therefore, its value was in issue before the bureau. Nevertheless,

the contention with which we are now engaged with respect to an increase in the real estate value was not specifically mentioned; and certainly the question of whether intangibles might be included in invested capital was not specifically mentioned.

I take it that the regulation of the Secretary of the Treasury in regard to refund applications setting forth under oath "all facts relied on in support of the claim" is valid. (Paul Jones & Co. v. Lucas, 33 Fed. (2d) 907, 908; Art Metal Const. Co. v. United States, 35 Fed. (2d) 379, 380.) I do not believe that the employment of the word "should" instead of the word "shall" makes any difference.

55 The obvious purpose of the regulation was to secure bringing before the commissioner enough to enable him to make a fair decision. What was prescribed was "facts"; not facts alone but "all facts relied upon in support of the claim," and those were required to be "clearly set forth under oath," A taxpayer seeking relief suffered no risk and incurred no penalty through failure to furnish evidence or to make a contention or to give a reason or to cite a provision of law. He was left free to base a suit upon theories or upon arguments or upon statutory interpretations or upon court decisions which he had ignored when he framed his refund claim. He was merely debarred from judicial relief upon facts different from those presented to the administrative officials. The Government, in its consent to be sued, limited recovery to instances in which "all facts" relied on had previously been embodied in a verified refund application. Compliance is a condition precedent to maintaining the action. (Rock Island, etc., R. R. v. United States, 254 U. S. 141, 143.)

Was the assertion that there was an "abnormal" condition in invested capital a full relation of the facts on which the case at bar turns? Was that assertion equivalent to telling the commissioner that invested capital should include a larger sum for real estate or should include a sum for intangibles? I think not. (See Arizona Commercial Mining Co. v. Casey, 32 Fed. (2d) 288, 290.)

I hold therefore that the 1918 refund claim did not set forth "all facts" within the meaning of the regulation.

56 4. The claim for refund of the 1918 taxes was filed in time. Apparently this is not now controverted.

5. If I be right as to the regulation, then, as I see it, there was no waiver. True, some officials had power to waive (Tucker v. Alexander, 275 U. S. 228, 230–1); but neither a ruling by the commissioner that the two items sued on were not proper elements of invested capital nor a temporary admission in the original answer (withdrawn by the amended answer) of the due filing of the 1918 refund claim was sufficient to constitute a waiver. An essential element of waiver is a conscious relinquishment of something that is known. Waiver must be either expressed or implied. Indisputably here there was no express waiver, as there was in Tucker v. Alexander; and I see in

the proof no warrant whatever for inferring a waiver. (See Arizona Commercial Mining Co. v. Casey, 32 Fed. (2d) 288, 291; Ritter v. United States, 19 Fed. (2d) 251, 252.)

6. Plainly, and I believe concededly, the 1920 refund claim (Exhibit 13) included both the real estate and the intangible items.

7. Within the time available for consideration, I have been unable to discover in the confusing phraseology of section 284 of the revenue act of 1926 (26 U. S. C. A., sec. 1065), or elsewhere, any provision which brings the 1920 refund application within the exceptions mentioned in the Revised Statutes, section 3228 (26 U. S. C. A.,
57 sec. 157), to the four years' period of limitations prescribed thereby. Failure of the answer to raise the issue is immaterial, because the burden is on the taxpayer to show affirmatively that the refund application was seasonably filed. (United States v. Richards, 27 Fed. (2d) 284.)

Unless agreed on, settle judgment, including findings, in accordance with the foregoing, on five days' notice.

Dated June 27, 1930.

FRANCIS G. CAFFEY, *U. S. D. J.*

58 In United States District Court

[Title omitted.]

Memorandum, Caffey, J., dated November 5, 1930

I have examined the briefs and the authorities cited. I have considered the findings proposed. I have also studied the questions raised and have formed some tentative impressions. Yet, I am somewhat uncertain what is the true significance of what is embraced in paragraph 7 of my memorandum of June 27, 1930, brought up on reargument. Since that memorandum was filed, the issue and the proof have so far passed out of mind that I feel that I can not now fairly dispose of the matters presented without going again over the entire record. If counsel will send me all the papers, including their memoranda, preferably in the form previously furnished, at the first opportunity I will again review the case.

Dated, November, 5, 1930.

(Sgd.) FRANCIS G. CAFFEY, *U. S. D. J.*

59 In United States District Court

[Title omitted.]

Memorandum, Caffey, J., dated November 10, 1930

This memorandum will deal only with taxes of 1920. It will discuss only refunds, as distinguished from credits. Accordingly, references to statutes hereafter, unless otherwise stated, will be confined to portions which apply to refunds of taxes of that year. In the inter-

est of brevity the Revised Statutes will be cited by giving merely the section numbers thereof.

I have reexamined all papers submitted pursuant to my memorandum of November 5. As I understand, the parties now stipulate that on May 6, 1926, the plaintiff filed with the Commissioner of Internal Revenue (1) a waiver of the taxpayer's right to have its taxes determined and assessed within the statutory time prescribed therefor and (2) a claim for refund. I say that this is my understanding, because to date the matter rests entirely on oral statements recently made by counsel at my chambers, reiterated or implied in their
60 briefs. The claim for refund (Exhibit 13) was put in evidence at the trial; but no waiver was then produced, although on the refund claim there is an entry (apparently in pencil) as follows: "Waiver dated 5–5–26 on file."

In view of the above, for the purpose of disposing of what is presently before me, I shall assume that it is undisputed, and that it is agreed that it shall be taken as part of the record, that both a waiver and a refund claim were duly filed with the commissioner on May 6, 1926. It may be remarked also that if the facts be as I have set out, then even at this late stage the admission on the record that the two papers were filed on the date stated merely saves the trouble of reopening the case so as to permit formal proof to that effect.

The sole question raised by the plaintiff is whether paragraph 7 of my memorandum of June 27, 1930, should be modified.

As already indicated, when I wrote the June memorandum there was no warrant for finding that a waiver had been filed. It is true that on Exhibit 13 there was a notation (by some undisclosed person) about a waiver; but, apart from that not having been called to my attention, it seems to me insufficient as evidence. I still feel that, without a showing of waiver, I should adhere to my first memorandum. (See Porter v. United States, 27 Fed. (2d) 882, 884.) If so, then all that remains for consideration is whether addition of proof of the waiver changes the result.

The issue turns on the condition of the law as it was amended by the revenue act of 1926. That is conceded, I believe, by
61 both sides. There are three relevant provisions. I shall recite and comment on such portions only of these provisions as seem to me relevant.

1. Section 3226 (26 U. S. C. A., sec. 156; 44 Stat. 116, sec. 1113–a) prohibits maintenance of a suit for the recovery of a wrongfully collected tax until a claim for refund has been filed. It also expressly requires that the claim shall be filed "according to the provisions of law in that regard." Those provisions are to be found in section 3228 or in other laws thereby extended to the subject.

2. Section 3228 (26 U. S. C. A., sec. 157; 44 Stat. 115, sec 1112), in subdivision (a), requires that, except as otherwise specified therein, refund claims be presented to the commissioner within four years next after payment of the tax. Among the exceptions, and the only

exception pertinent for examination here, is that contained in section 284 of the revenue act of 1926. Subdivision (a), after the passage of the revenue act of 1926, included a clause as follows:

"All claims for the refunding of any internal revenue tax alleged to have been erroneously * * * collected * * * must, except as provided in sections 284 * * * of the revenue act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax."

62 Mere inspection of the quoted words makes it manifest that, within the meaning of the filing requirement in section 3226 of the Revised Statutes, "the provisions of law in that regard" are that the refund claim be lodged with the commissioner either within four years after payment of the tax or in compliance with the terms, if applicable, of section 284 of the revenue act of 1926.

The tax was paid in 1921. The refund claim was presented in 1926. It is plain therefore that the presentation was not within the four years' period. Did that period govern? Obviously it did unless section 284 of the 1926 act exempted plaintiff from it. Whether plaintiff was exempted is the issue on which exclusively a solution depends. If, however, section 284 does fit the case at bar, then clearly section 3228 relieved plaintiff from the obligation to present to the commissioner its refund claim within four years next after payment of the tax. Unless that were so, the phrase therein, "except as provided in sections 284 * * * of the revenue act of 1926," would be completely deprived of significance.

3. In subdivision (b) of section 284 of the revenue act of 1926 (26 U. S. C. A., sec. 1065; 44 Stat. 66) there are very explicit exceptions from the operation of the four years' period. Among these is included the exception created by and defined in subdivision (g) of the same section. In the latter, in substance, it is said that if a taxpayer shall (1) on or before June 15, 1926, file a waiver and (2) on or before April 1, 1927, file a refund claim, then the refund to which he may show himself entitled shall be made. The exact language employed on the point is this:

63 "If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 * * *, then such * * * refund relating to the taxes for the taxable year 1920 * * * shall be * * * made if claim therefor is filed on or before April 1, 1927, or within four years from the time the tax was paid."

The taxpayer was thus afforded two alternatives—either (1) to file a waiver by June 15, 1926, and file a refund claim within four years following payment of the tax, or (2) to file the waiver by June 15, 1926, and then on or prior to April 1, 1927, file a refund claim.

Inasmuch as plaintiff filed both documents (the waiver and the refund claim) preceding the prescribed dates, it has brought itself within the exception embraced in subdivision (g) and, accordingly, has thereby relieved itself from the duty to file a refund claim within

four years next after paying the tax as a prerequisite to maintaining the suit.

To summarize: By force of section 3226, it is a condition precedent to the maintenance of suit that a refund claim be filed "according to the provisions of the law in that regard." By force of subdivision (a) of section 3228, as well as of subdivision (b) (1) of section 284 of the revenue act of 1926, the suit must fail unless either (as did not happen) the refund claim was filed within four years after payment of the tax or (as did occur), by force of subdivision (g) of section 284, a waiver was filed on or before June 15, 1926, and a refund claim was filed on or before April 1, 1927.

64 Inasmuch as subdivision (a) of section 3228, after the passage of the revenue act of 1926, expressly excepted from the operation of the four years' period of limitation any case provided for in section 284 of the revenue act of 1926 and subdivision (b) of section 284 of the revenue act of 1926 expressly excepted from the operation of the four years' period of limitation cases, covered by subdivision (g) of that section, in which a taxpayer by June 15, 1926, filed a waiver and by April 1, 1927, filed a refund claim, I see no escape from holding that the present action, so far as concerns the 1920 taxes, is not barred by limitations.

The argument of the Government is that section 284 of the act of 1926 is only administrative; that it merely enables the commissioner, in his discretion, to grant refunds, without conferring any right upon or affecting any remedy of the taxpayer. This contention is based on the premise that the statutes as they stood after the enactment of the revenue act of 1926 were identical in effect with, and the position is sought to be sustained by citation of cases involving, section 252 of the revenue act of 1921 or that section as amended March 4, 1923, construed in conjunction with section 3228 as it was then framed; but I think that neither section 252 nor either case relied on (J. H. Williams & Co. v. United States, D. C. E. D. N. Y., March 25, 1930, unreported; Jonesboro Grocer Co. v. United States, 66 Ct. Cl. Rep. 320) has any application. Moreover, if these court decisions should be deemed to mean that the statutes here involved ought to lead

65 to the same consequences as such decisions attribute to the earlier statutes there discussed, I should regard them as wrong and, in the absence of their approval by controlling authority, I would decline to follow them.

In the first place, it seems to me sufficient to say that, while in the respects material now, section 3226 as reenacted in 1921 (42 Stat. 315) or as amended in 1923 (42 Stat. 1503) was the same as it was after the revenue act of 1926, yet section 3228 was worded in 1921 and 1923 (42 Stat. 314) contained no exception, made no reference to any other provision of law and unqualifiedly limited to four years next after payment of the tax the time for presenting a refund claim therefor to the commissioner. So also section 252 of the revenue act of 1921 (42 Stat. 268), as well as that section as amended in 1923

(42 Stat. 1504), provided "that if, upon examination of any return" for certain designated years, it appear that an amount of tax has been paid "in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess" shall be credited against any taxes "then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer." It is believed that the differences between the two sets of statutory provisions—

66 those preceding and those following the enactment of the revenue act of 1926—prevent the one from shedding light on the meaning of the other and render the court decision construing the earlier statutes inapplicable to the interpretation of the later statutes.

It may well be conceded that unless section 252 were limited to administrative funds, there would, in the absence of its being mentioned in section 3228, be a conflict between the two sections. On the principle of avoiding conflict in statutory language when possible, it may be admitted that confining section 252 to administrative funds was justified. Here, however, the situation is wholly altered. After 1926, section 3228 did refer to section 284. It was specifically said in the former that the filing of refund claims within the four years' period should not be required in the cases of taxpayers who complied with section 284 by filing waivers and refund claims preceding the dates therein fixed therefor.

Again, employment in section 252 of the opening words "upon examination of any return" lends support to the Government's insistence that the section was designed only to permit overpayments to be refunded when discovered by the commissioner on his scrutiny of the face of the returns. It will be noted, however, that section 284 is not so limited; on the contrary, that section definitely provides for claims initiated and urged by taxpayers themselves.

Lastly, on this aspect, in the 1923 amendment to section 252 (42 Stat. 1505) there is a proviso relating to the filing of both waivers and refund claims. This, however, apart from other differences in its phraseology from section 284, applies only to 1917 taxes.

67 The taxes dealt with in the Williams case, supra, were for 1918, and hence a decision in that case contains nothing with respect to this particular proviso. Likewise, the Jonesboro case, supra, does not mention the proviso. The consequence is that the only part of the 1923 amendment to section 252 which has any similarity even to section 284, with which we are now concerned, was not construed by either of the decisions cited by the Government.

In the second place, sections 3226, 3228, and 284, all alike, have to do with filing. Section 3228 uses the word "presented," but plainly in the sense of "filing." I conceive of no reason why a regulation by

section 284 of filing should be excluded from, while a regulation by section 3228 of filing is included in, the "provisions of law in that regard" mentioned in section 3226.

Filing as a prerequisite to suit rests on, and is established by, section 3226. That section leaves the method of filing to be ascertained from other "provisions of law." When the provisions outside of section 3226 are consulted, it is found that they are embraced as much in section 284 as in section 3228. It would nullify a part of section 3228 if account were not taken of section 284. It would equally nullify subdivision (g) of section 284 if the filing of a refund claim by April 1, 1927, were not deemed timely when it had been preceded by a waiver filed in advance of June 15, 1926. The two sections stand on the same footing. I discover no room or occasion, or even excuse, for narrowing the field of operation of section 284 so as, after the revenue act of 1926, to continue a system of administrative refunds, theretofore prevailing under differently worded legislation—legislation which was superseded in 1926—and so as, subsequent to 1926, to prevent, on the ground of delay, what may be called court refunds to taxpayers who have filed waivers and refund claims in strict conformity with the new laws brought into being in 1926.

68

My conclusions, therefore, are that (1) on the facts before me at the time of my first memorandum, paragraph 7 was correct; (2) on those facts supplemented by the new fact with respect to the filing of a waiver, the four years' period of limitations does not apply and plaintiff's refund claim was filed seasonably.

In event counsel do not agree on the findings, settle them on three days' notice. In the meanwhile it will be convenient for the papers to remain at my chambers; but they will be available to either side and, if needed in preparing the proposed findings, may be withdrawn.

Dated, November 10, 1930.

FRANCIS G. CAFFEY, *U. S. D. J.*

69 In United States District Court

[Title omitted.]

Memorandum, Caffey, J., dated November 15, 1930

Since the filing of my memorandum of November 10, the defendant has submitted a supplemental memorandum, which is in the nature of an application for a rehearing. I have been carefully over it.

Except in the two respects mentioned below, I have already dealt with every argument now advanced by the defendant.

1. Fox v. Edwards (287 Fed. 669) is cited. It is to be noted, however, that the action there was against a collector, whereas the case here is against the Government. In dealing with section 252 of the revenue act of 1918, Judge Rogers (p. 673) explicitly de-

clared that it was wholly without effect upon a suit against the collector. He furthermore (p. 674) disclaimed expressing any opinion as the the bearing of the section upon a suit against the United States.

70 2. Section 284 of the revenue act of 1926 (44 Stat. 66) follows, as the defendant says, the subtitle of "credits and refunds." For reasons which I assigned in United States v. Mouyas (42 Fed. (2d) 743), at pages 744–5, I do not feel that the employment of this subtitle is of any significance whatsoever in the ascertainment of the meaning of the section.

I accordingly adhere to my November 10 memorandum.

Dated, November 15, 1930.

FRANCIS G. CAFFEY, *U. S. D. J.*

71 In United States District Court

[Title omitted.]

Petitioner's findings of fact and conclusions of law

FINDINGS OF FACT

1. Petitioner, Henry Prentiss & Company, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the city of New York.

Allowed.

2. On or about June 16, 1919, petitioner filed its income and profits tax return for the year 1918, showing a total income and profits tax of $535,144.20, which was paid by petitioner on June 16, 1919.

Allowed.

3. Subsequent to filing the above-mentioned return and during the year 1920, the Commissioner of Internal Revenue made an additional assessment of tax for the year 1918 in the amount

72 of $119,191.19, and said additional tax was paid by petitioner on December 28, 1920. Allowed.

4. Thereafter the Commissioner of Internal Revenue recomputed the income and profits tax of petitioner for the year 1918, and same was finally determined and fixed by the Commissioner of Internal Revenue at the sum of $644,776.20, and the Commissioner of Internal Revenue refunded to the petitioner the sum of $9,559.19, representing the difference between the tax as finally assessed and the tax theretofore paid. Allowed.

5. On or about March 15, 1920, petitioner filed its income and profits tax return for the year 1919 showing a total income and profits tax of $43,375.24, which was paid by petitioner in installments during the year 1920. Allowed.

6. Thereafter the Commissioner of Internal Revenue recomputed the income and profits tax of petitioner for the year 1919 and the same was finally determined and fixed by the Commissioner of In-

ternal Revenue at the sum of $42,851.67 and the Commissioner of Internal Revenue refunded to petitioner the sum of $523.57, representing the difference between the tax as finally assessed and the tax theretofore paid. Allowed.

7. On or about March 15, 1921, petitioner filed its income
73 and profits tax return for the year 1920 showing a total income and profits tax of $94,249.50, which was paid by petitioner in installments as follows: $23,562.37 on March 17, 1921, $23,562.37 on June 15, 1921, $23,562.38 on September 16, 1921, and $23,562.38 on December 15, 1921. Allowed.

8. Thereafter the Commissioner of Internal Revenue recomputed the income and profits tax of petitioner for the year 1920 and the same was finally determined and fixed by the Commissioner of Internal Revenue at the sum of $92,265.40, and the Commissioner of Internal Revenue refunded to petitioner the sum of $1,984.10, representing the difference between the tax as finally assessed and the tax theretofore paid. Allowed.

9. On or about the 1st day of September, 1916, petitioner purchased all of the business, property and assets, including name, good will, contracts, and rights of every character and description of Prentiss Tool & Supply Company, a New York corporation, subject to the debts of said corporation, and said property so purchased was bona fide paid in to petitioner on September 1, 1916, for stock of petitioner of the par value of $490,000, at the time of such purchase; said stock consisted of 4,900 shares of the par value of $100 each. Allowed.

10. The actual cash and the actual cash value of the tangible
74 property other than cash, and of name, good will, contracts, and rights of every character and description so bona fide paid in to petitioner for said $490,000 par value of stock of petitioner at the time of such purchase was $1,352,837.74 of which the actual cash and actual cash value of tangible property other than cash amounted to $1,052,837.94 and the actual cash value of name, good will, contracts, and rights of every character and description amounted to $300,000. Allowed.

11. 3,812 shares of stock of the par value of $381,200 was issued by petitioner for the cash and tangible properties other than cash paid in to petitioner, and 1,088 shares of stock of the par value of $108,800 was issued for the intangible properties paid in for said stock. Allowed.

12. The total stock of petitioner outstanding on March 3, 1917, amounted to 5,000 shares of the par value of $500,000. Allowed.

13. The actual cash and the book value of the tangible property other than cash so paid in to petitioner and for which said stock was issued amounted to $1,006,466.66 at the time of such purchase. Such book value was $46,371.08 less than the actual cash value of such property. Said difference in book value and actual cash value was

represented by a certain piece of real estate located in Jersey
75 City, New Jersey, and included in the property paid into petitioner for said stock September 1, 1916. Said real property was carried on the books of the Prentiss Tool & Supply Company and entered on the books of petitioner in the sum of $34,628.92; the actual cash value of said real estate on September 1, 1916, the time it was paid into petitioner, was $81,000, divided as follows: Land value $23,000 and building value $58,000. **Allowed.**

14. The Commissioner of Internal Revenue in computing the paid in surplus of petitioner for the purposes of determining the invested capital of petitioner for each of the years 1918, 1919, and 1920 included cash and all tangibles other than cash at actual cash value, except in the case of said real estate. Said real estate was included in paid-in surplus at book value or at $46,371.08 less than its actual cash value. Allowed.

15. The Commissioner of Internal Revenue in computing invested capital of petitioner for each of the years 1918, 1919, and 1920 did not include therein any amount for name, good will, contracts, or for any intangible property. Allowed.

16. It was stipulated between the parties that if petitioner is entitled to the inclusion in invested capital for any of the years 1918, 1919, and 1920 of an amount on account of intangible property paid in for stock of petitioner, that amount shall be fixed at $107,500. Allowed.

76 17. Petitioner duly filed a claim for refund of income and profits taxes paid by petitioner for the year 1918. **Disallowed.**

18. Said claim for refund was prepared on the form for such refund claims furnished by the Commissioner of Internal Revenue and then in common use and was duly executed by petitioner. Such claim is plaintiff's Exhibit 3, and is made a part hereof by reference. Disallowed.

19. Thereafter the Commissioner of Internal Revenue allowed the petitioner additional time to furnish information in support of the said claim for refund, and oral hearings were had before the commissioner and the Solicitor of Internal Revenue, the last of which was on April 12, 1926. Disallowed.

20. The Commissioner of Internal Revenue rejected and disallowed petitioner's claim for refund. Allowed.

21. Petitioner did not file in the office of the Commissioner of Internal Revenue a claim and demand for refund of income and profits taxes paid by petitioner for the year 1919. Allowed.

22. On the 6th day of May, 1926, petitioner filed a claim and
77 demand for refund in the sum of $9,113.48 of income and profits taxes paid by petitioner for the year 1920.

23. On the 6th day of May, 1926, petitioner filed with the said claim for refund a waiver of its right to have the taxes due for the

taxable year 1920 determined and assessed within the time prescribed by law under any then existing or prior revenue acts. Allowed.

24. Said claim and demand for refund and said waiver were respectively prepared on the forms for refund claims and waivers furnished by the Commissioner of Internal Revenue and then in common use and was duly executed. Allowed.

25. By letter dated September 25, 1926, which is plaintiff's Exhibit 14, and made a part hereof by reference, the Commissioner of Internal Revenue advised petitioner that said refund claim was rejected and no amount on account thereof has been refunded to petitioner. Allowed.

26. The Commissioner of Internal Revenue considered said claim for refund on the merits and did not at any time claim that the said claim for refund was not filed within the time provided by law. Disallowed.

78 27. This action was commenced prior to two years after the denial and rejection of the said claims for refund for the years 1918 and 1920 and more than six months after the filing thereof. Allowed.

CONCLUSIONS OF LAW

1. On account of intangible property bona fide paid into petitioner for stock of petitioner of a par value in excess of $107,500, section 326 of the revenue act of 1918 entitled the petitioner to have included in its invested capital for each of the years 1918, 1919, and 1920 the sum of $107,500 in excess of the amount heretofore allowed petitioner as invested capital for each of said years. Allowed.

2. On account of the excess actual value of tangible property over the book value thereof section 326 of the revenue act of 1918 entitled the petitioner to a paid-in surplus of $46,371.08 in excess of the paid-in surplus heretofore allowed and found by the Commissioner of Internal Revenue and used by the commissioner in computing invested capital of the petitioner for each of the years 1918, 1919, and 1920. Allowed.

3. In computing the invested capital of petitioner for each of the years 1918, 1919, and 1920, depreciation should be charged against the actual value of said building paid in to petitioner on
79 September 1, 1916, at the rate of three per cent per annum, computed from September 1, 1916, and adjustments in invested capital and income as a result of such depreciation as compared with the amounts heretofore used by the Commissioner of Internal Revenue should be made for each of said years. Allowed.

4. By reason of the failure of the Commissioner of Internal Revenue to include said sum of $107,500 in invested capital of petitioner, and by reason of the failure of the Commissioner of Internal Revenue to allow petitioner a paid in surplus of $46,371.08 and to compute invested capital of petitioner for each of the years 1918, 1919, and 1920 in accordance therewith, the invested capital of petitioner

for each of said years was under-stated and the amount of the income of petitioner was incorrectly determined, and petitioner was required to and did pay income and excess-profits taxes for each of said years in excess of the amount legally assessable against it.

Allowed.

5. The amount of income and excess-profits taxes legally assessable against petitioner for the year 1918 was $632,673.25 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for such year the sum of $12,102.95 in excess thereof. Allowed.

6. The amount of income and excess-profits taxes legally
80 assessable against petitioner for the year 1919 was $40,499.88 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for said year the sum of $2,351.79 in excess thereof. Allowed.

7. The amount of income and excess-profits taxes legally assessable against petitioner for the year 1920, if computed with the benefit of the over-assessments hereinbefore found to have been made for the years 1918 and 1919, is $83,630.12 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for said year the sum of $8,635.28 in excess thereof. Disallowed.

8. The amount of income and excess-profits taxes legally assessable against petitioner for the year 1920, if computed without the benefit of the over-assessments found to have been made for the years 1918 and 1919 is $82,970.05 and the Commissioner of Internal Revenue has assessed petitioner and petitioner has paid for taxes for said year the sum of $7,975.21 in excess thereof. Disallowed.

9. In computing the invested capital and income and excess-profits tax of petitioner for the year 1920 petitioner is entitled to the benefits of over-assessments for the years 1918 and 1919. Disallowed.

10. The refund claim filed by petitioner for the recovery of
81 taxes claimed to have been illegally assessed for the year 1918 complied with the statutes of the United States and with the regulations of the Secretary of the Treasury, prescribed pursuant to said statutes and was sufficient to entitle the petitioner to recover the taxes wrongfully and erroneously assessed against it for said year. Disallowed.

11. The Commissioner of Internal Revenue waived his right to say that the said claim for refund was not in compliance with the statutes of the United States and with the regulations of the Secretary of the Treasury prescribed pursuant to said statutes. Disallowed.

12. The Commissioner of Internal Revenue was estopped to claim that the said claim for refund was not in compliance with the statutes of the United States and with the regulations of the Secretary of the Treasury prescribed pursuant to said statutes. Disallowed.

13. The admission in the answer in this action that the said claim for refund was pursuant to the statutes of the United States and to the regulations of the Secretary of the Treasury prescribed pursuant

to said statutes is binding upon the defendant and relieved the petitioner of the burden of proving affirmatively that the said claim for refund was in compliance with the statutes of the United
82 States and with the regulations of the Secretary of the Treasury prescribed pursuant thereto. Disallowed.

14. The claim for refund for the recovery of taxes claimed to have been illegally assessed for the year 1920 was filed within the time prescribed by the statutes of the United States. Allowed.

15. The admission by the defendant in its answer that the claim for refund for 1920 was duly filed pursuant to the statutes of the United States is binding upon the defendant and relieved the petitioner of the burden of proving affirmatively that the said claim for refund was duly filed pursuant to the statutes of the United States. Disallowed.

16. Petitioner is entitled to judgment in the sum of $12,102.95 on account of taxes paid by it for the year 1918 in excess of the amount legally assessable against petitioner, together with interest on said sum from December 28, 1920. Disallowed.

17. Petitioner is entitled to judgment in the sum of $7,975.21 on account of taxes paid by it for the year 1920 in excess of the amount legally assessable against petitioner, together with interest on said sum from August 1, 1921. Allowed.

FRANCIS G. CAFFEY.

83 In United States District Court

[Title omitted.]

Defendant's findings of fact and conclusions of law

The above-entitled action having been regularly on the calendar of this court and having come on to be heard on the 28th day of February, 1930, and the plaintiff having appeared by Jeffery and Redmond, its attorneys, Joseph F. Murray and William P. Jeffery, of counsel, and the defendant having appeared by Charles H. Tuttle, Esq., United States attorney, Leon E. Spencer, assistant United States attorney, of counsel, and the parties having presented their proofs, now after hearing Joseph F. Murray, counsel for the plaintiff, and Leon E. Spencer, counsel for the defendant, and the court having made and filed its written opinion, and due deliberation having been had, I decide and find as follows:

I. That at all the times hereinafter mentioned, and since August 17, 1916, the plaintiff was and still is a corporation organized under the laws of the State of New York and having its principal place of business in the city of New York. Allowed.

84 II. That the plaintiff on June 16, 1919, filed its income and profits tax return for the calendar year 1918, and on June 16, 1919, paid to the collector of internal revenue for the second district of New York the tax shown due by said return in the sum of $535,144.20. Allowed.

III. That during the year 1920 an additional assessment in the amount of $119,191.19 was levied against the plaintiff on account of income and profits taxes for the calendar year 1918; that the said amount was paid by the plaintiff to the collector of internal revenue for the second district of New York on December 28, 1920.

Allowed.

IV. That of the aforesaid amounts paid as an income and profits tax for 1918 by the plaintiff, there was refunded to the plaintiff pursuant to the direction of the Commissioner of Internal Revenue the sum of $9,559.19. Allowed.

V. That on March 25, 1924, the plaintiff filed a claim for refund with the Commissioner of Internal Revenue seeking the return of $200,000 income and profits taxes paid for the calendar year 1918 on grounds as stated in said claim for refund (plaintiff's Exhibit 3).

Allowed.

That the plaintiff was entitled to relief under sections 327 and 328 of the revenue act of 1918. Disallowed.

85 VI. That on July 16, 1925, the Commissioner of Internal Revenue rejected the plaintiff's claim for refund filed for 1918, signing a rejection schedule, No. 21937, on September 3rd, 1926, and asserted that the plaintiff was not entitled to any relief under sections 327 and 328 of the revenue act of 1918. Allowed.

VII. That the plaintiff on March 17, 1921, filed its income and profits tax return for the calendar year 1920, and the tax shown due on said return was paid by the plaintiff to the collector of internal revenue for the second district of New York, as follows:

March 17, 1921	$23,562.37
June 15, 1921	23,562.37
September 15, 1921	23,562.38
December 15, 1921	23,562.38

Allowed.

VIII. That on May 6, 1926, the plaintiff filed a claim for refund with the Commissioner of Internal Revenue seeking the return of $9,113.48 income and profits taxes paid for the calendar year 1920 on grounds as stated in said claim for refund (plaintiff's Exhibit 13); that the plaintiff was entitled to include in invested capital under section 326 of the revenue act of 1918 an additional sum of $180,670.08. This sum of $180,670.08 was to include an additional value for tangibles in the sum of $55,670.08 and a value for intangibles in the sum of $125,000.00. Allowed.

86 IX. That on September 26, 1926, the Commissioner of Internal Revenue rejected the plaintiff's claim for refund filed for 1920 on Schedule 7874, dated October 13, 1926, and asserted that the plaintiff was not entitled to include in its invested capital for the year 1920 any additional sum for tangibles or any sum whatsoever for intangibles. Allowed.

X. That the plaintiff was organized and incorporated on August 17, 1916, with an authorized capital stock of $10,000 par value.

Allowed.

XI. That the 100 shares of the stock of the plaintiff was on August 17, 1916, issued to Marshall Prentiss, George L. Wilson, and Charles A. Goodspeed in exchange for 100 shares of stock of Atchison Topeka and Santa Fe Railway Company having a par value of $10,000. Allowed.

XII. That on August 25, 1916, Henry Prentiss & Company, Inc., increased its authorized capital stock from $10,000 to $500,000 consisting of 5,000 shares of the par value of $100 each. Allowed.

XIII. That on September 1, 1916, Henry Prentiss & Company acquired all the assets both real and personal of the Prentiss Tool & Supply Company and in exchange and payment therefor
87 issued to the Prentiss Tool & Supply Company 49,000 shares of its stock of the par value of $100 per share. Allowed.

XIV. That the value of the tangible property purchased by Henry Prentiss and Company, Inc., on September 1, 1916, from the Prentiss Tool and Supply Company exceeded the par value of the stock issued therefor. Allowed.

XV. The statement of the closing balance sheet of the Prentiss Tool & Supply Company as of August 31, 1916, did not include any value for intangibles. Allowed.

XVI. The statement of the opening balance sheet of Henry Prentiss & Company, Inc., showing the assets acquired from Prentiss Tool & Supply Company, included no value whatsoever for intangibles. Allowed.

XVII. That a part of the tangible property acquired by the Henry Prentiss & Company, Inc., at the time of its organization from the Prentiss Tool & Supply Company, consisted of certain land and a warehouse located in Jersey City, New Jersey. Allowed.

XVIII. That the Commissioner of Internal Revenue, in
88 computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31, 1918, and December 31, 1920, included in the invested capital of plaintiff for each of said years only the sum of $34,628.92 as the actual value of said real estate. Allowed.

XIX. That the actual value of said real estate on September 1, 1916, was $81,000.00, divided as follows: Land value $23,000.00, and building value of $58,000.00. Allowed.

XX. That in computing the income and excess-profits and war-profits taxes due from plaintiff for each of the years ending December 31, 1918, and December 31, 1920, the Commissioner of Internal Revenue did not include in, and as invested capital, any sum for intangible property, including name, good will, contracts, and rights. Allowed.

XXI. That the actual value of intangible property acquired by the plaintiff, including name, good will, contracts, and rights, was on September 1, 1916, in excess of the sum of $300,000. Allowed.

XXII. That the claim for refund filed with the Commissioner of Internal Revenue seeking the return of $200,000 income and profits

taxes paid for the calendar year 1918 by the plaintiff
89 did not state the same grounds and/or facts as are now urged in the present suit. Allowed.

XXIII. That the plaintiff filed its claim for refund, seeking the return of 1920 income and profits taxes paid, more than four years after the payment of such tax. Allowed.

XXIV. The net income of the plaintiff for the year 1918 was $949,333.74. Allowed.

XXV. The plaintiff's invested capital for the year 1918 was $1,566,019.05 Disallowed.

XXVI. The net income of the plaintiff for the year 1920 was $381,918.32. Allowed.

XXVII. The plaintiff's invested capital for the year 1920 was $1,625,862.80. Disallowed.

From the foregoing findings of fact, I have reached the following conclusions of law:

1. That the plaintiff's claim for refund seeking the recovery of 1918 income and profits taxes does not support in anywise the present suit. Allowed.

90 2. That the plaintiff's claim for refund seeking the recovery of 1920 income and profits taxes was not duly filed as provided by law and statutes applicable thereto. Disallowed.

2A. The waiver filed by the plaintiff for the year 1920, on May 5, 1926, pursuant to section 278 of the revenue act of 1926, did not extend the time within which the plaintiff could file a claim for refund for the calendar year 1920 so as to permit a suit to be brought in court as a result of its disallowance. Disallowed.

2B. The rejection of the plaintiff's claim for refund seeking the return of a part of its income and profits taxes paid for the calendar year 1920 did not entitle the plaintiff to bring an action in the District Court for the relief requested in said claim for refund. Disallowed.

3. The plaintiff was not entitled to inclusion in invested capital for the calendar years 1918 or 1920 of any amount for intangibles in the computation of its Federal income and profits tax for those years. Disallowed.

4. At the time of the organization of Henry Prentiss & Company, Inc., and/or prior to March 3, 1917, no intangible property
91 was bona fide paid in for any of the 5,000 shares of stock of Henry Prentiss & Company, Inc. Disallowed.

5. The defendant is entitled to judgment dismissing the petition on the merits, together with the costs and disbursements of this action. Disallowed.

FRANCIS G. CAFFEY, *U. S. D. J.*

Findings and conclusions respectfully allowed or disallowed this day in accordance with the notations made by me in the margin.

January 20, 1931.

FRANCIS G. CAFFEY, *U. S. D. J.*

92 In United States District Court

[Title omitted.]

Petitioner's exceptions to findings of fact and conclusions of law

I. The petitioner, Henry Prentiss & Co., Inc., hereby excepts to the defendant's findings of fact numbered VI and XXII, allowed by the court herein.

II. The petitioner further excepts to the court's refusal to find petitioner's proposed findings of fact numbered 17, 18, 19, and 26.

III. The petitioner further excepts to the court's conclusion of law as submitted by the defendant numbered 1, upon the ground that the evidence shows that the petitioner's claim for refund seeking recovery of 1918 income and profits taxes was in conformity with the statutes of the United States and the regulations of the Secretary of the Treasury.

IV. The petitioner further excepts to the refusal of the
93 court to make conclusions of law numbered 7, 8, 9, 10, 11, 12, 13, 15, and 16, requested by petitioner.

JEFFERY & REDMOND,
Attorneys for Petitioner,
14 Wall Street, New York City.

The above exceptions are allowed.

FRANCIS G. CAFFEY, *U. S. D. J.*

In United States District Court

[Title omitted.]

Defendant's exceptions to findings of fact and conclusions of law

I. The defendant, United States of America, hereby excepts
94 to the petitioner's findings of fact allowed by the court herein numbered five, six, nine, ten, eleven, thirteen, and sixteen.

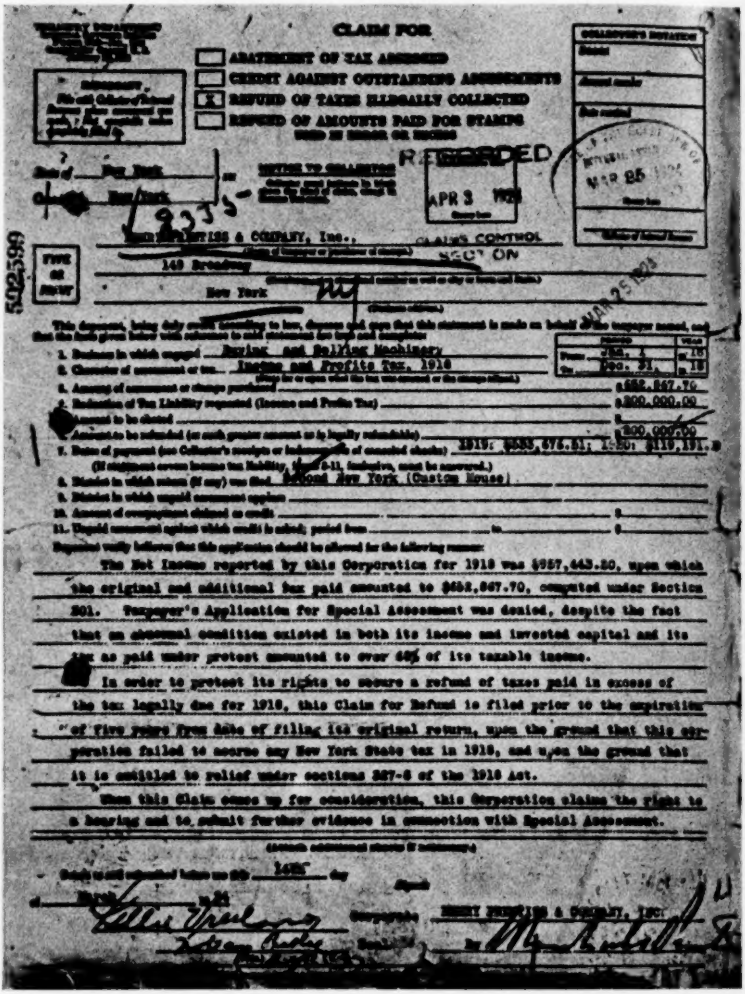
II. The defendant further excepts to the court's refusal to find defendant's proposed findings of fact numbered twenty-five and twenty-seven and so much of five as was disallowed.

III. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered one, upon the ground that there is no evidence to show that good will in any amount was ever bona fide paid in for any shares of stock of the petitioner.

IV. Defendant further excepts to the court's conclusion of law as submitted by the petitioner numbered four, upon the same ground as that set forth in paragraph "III" herein.

V. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered five, upon the ground that there is no evidence to support the same and that it is contrary to and against the evidence.

PETITIONER'S EXHIBIT 3



CLAIM FOR

☐ ABATEMENT OF TAX ASSESSED
☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
☒ REFUND OF TAXES ILLEGALLY COLLECTED
☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN EXCESS OR ERROR

RECORDED

APR 3 1923

COLLECTOR'S ENTRIES

APR 25

5025389

TYPE OF PRINT

149 Broadway

New York

JUN 25 1923

Bearing and Rolling Machinery

Income and Profits Tax, 1918

From Jan. 1, 1918
To Dec. 31, 1918

$682,847.70

$300,000.00

$

$300,000.00

1919: $533,676.81; 1920: $119,191.8

Internal Revenue Collector, New York (Custom House)

The Net Income reported by this Corporation for 1918 was $957,443.80, upon which the original and additional tax paid amounted to $682,847.70, computed under Section 301. Taxpayer's Application for Special Assessment was denied, despite the fact that an abnormal condition existed in both its income and invested capital and its tax as paid under protest amounted to over 60% of its taxable income.

In order to protect its rights to secure a refund of taxes paid in excess of the tax legally due for 1918, this Claim for Refund is filed prior to the expiration of five years from date of filing its original return, upon the ground that this corporation failed to accrue any New York State tax in 1918, and upon the ground that it is entitled to relief under sections 327-8 of the 1918 Act.

When this Claim comes up for consideration, this Corporation claims the right to a hearing and to submit further evidence in connection with Special Assessment.

14th day

March, 1923

Corporate name: HENRY PRENTISS & COMPANY, INC.

By

VI. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered six, upon the ground that there is no evidence to support the same and that it is contrary to and against the evidence.

VII. Defendant further excepts to the court's conclusion
95 of law, as submitted by the petitioner, numbered fourteen, upon the ground that there is no evidence to support the same and that it is contrary to and against the evidence.

VIII. Defendant further excepts to the court's conclusion of law as submitted by the petitioner, numbered seventeen, upon the same grounds as stated in the preceding paragraphs hereof.

IX. Defendant further excepts to the refusal of the court to make conclusions of law, as requested by it, numbered two, two–a, two–b, three, four, and five.

ROBERT E. MANLEY,
Acting United States Attorney.

The above exceptions are allowed.

FRANCIS G. CAFFEY, *U. S. D. J.*

96 In United States District Court

[Title omitted.]

Order settling bill of exceptions

Upon the annexed consent and on motion of George Z. Medalie, United States attorney for the Southern District of New York, and on motion of Jeffery & Redmond, attorneys for petitioner, I have signed, settled, and allowed the foregoing, together with the exhibits offered and received in evidence and the plaintiff's and defendant's findings of fact and conclusions of law, with all exceptions taken and filed as petitioner's and defendant's bill of exceptions.

Dated, N. Y., December 29, 1931.

FRANCIS J. CAFFEY, *U. S. D. J.*

Consented to.
JEFFERY & REDMOND,
Attorney for the Petitioner.

Consented to.
GEORGE Z. MEDALIE,
U. S. Attorney,
Attorney for Defendant.

98 *Petitioner's Exhibit 5*

Address reply to Commissioner of Internal Revenue and refer to IT: CA–2118–11.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, May 13, 1924.

HENRY PRENTISS AND COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: Reference is made to your claim for refund of 1918 income and profits taxes in the amount of $200,000.00.

Your claim is based upon the contention that accrued New York State taxes should be allowed as a deduction from net income and that relief should be granted under the provisions of sections 327 and 328 of the revenue act of 1918.

No consideration may be given under the provisions of sections 327 and 328 until statutory net income and invested capital are definitely determined. It is therefore necessary that you acquiesce in the net income and invested capital as shown in the revenue agent's report dated March 25, 1920, for the year 1918 or submit exceptions, if any, which you may take thereto. If exceptions are taken,
99 they should be presented in the form of an appeal prepared in accordance with the provisions of Treasury Decision 3492, a copy of which is enclosed.

Whether you acquiesce the net income and invested capital as previously determined to be correct or file a brief or exceptions thereto, it is necessary that all information in connection with your claim for relief under sections 327 and 328 be presented for consideration, for the reason that the committee on appeals and review in a memorandum dated November 23, 1921, denied a similar request.

As it is desired to expedite consideration of your claim, you are requested to submit the information outlined above within twenty days from the date of this letter, referring in your reply to IT: CA–2118–11.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner,
By JOHN G. REMEY,
Chief of Section.

Henry Prentiss & Co., Inc., New York. Recd. May 14, 1924.
Answered by ——— ———.

100 *Petitioner's Exhibit 6*

Address reply to Commissioner of Internal Revenue and refer to IT:CA–2118–11.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 23, 1924.

HENRY PRENTISS & COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: This will confirm an extension of time until June 27, 1924, which was verbally granted by this office on June 12, 1924, within which to furnish data requested in office letter of May 13, 1924.

In any further correspondence reference should be made to IT:CA–2118–11.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner,
By JOHN G. REMEY,
Chief of Section.

Henry Prentiss & Co., Inc., New York. Recd. Jun. 25, 1924.
Answered by ——— ———.

101 *Petitioner's Exhibit 8*

Address reply to Commissioner of Internal Revenue and refer to IT:E:SM;RCA–A–758.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Jun. 26, 1925.

HENRY PRENTISS AND COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: Reference is made to your letter of June 26, 1924, in which you appeal from the decision of the bureau in denying your corporation relief under sections 327 and 328 of the revenue act of 1918 for the year 1918.

You are advised that a careful review of your case in comparison with representative corporations reveals no abnormality evidenced by gross disproportion between the tax computed without the benefits of sections 327 and 328 and the tax computed by reference to representative concerns specified in section 328.

102 The action of the bureau in denying your appeal for special assessment is, therefore, sustained, and your case is deemed closed.

Respectfully,

C. R. NASH,
Acting Commissioner.

Henry Prentiss & Co., Inc., New York. Recd. June 29, 1925.
Answered by ——— ———.

Petitioner's Exhibit 9

Address reply to Commissioner of Internal Revenue and refer to IT:E:SM-60-D; RCA-A-758.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 16, 1925.

HENRY PRENTISS AND COMPANY, INCORPORATED,
149 Broadway, New York, New York.

SIRS: Your claim for refund of $200,000.00 income and excess-profits tax for the calendar year 1918 has been examined.

103 The basis of the claim is an application under the provisions of section 327 for assessment of your profits tax as prescribed by section 328 of the revenue act of 1918.

Under date of June 26, 1925, you were advised that your case revealed no abnormality evidenced by gross disproportion between the tax computed without the benefit of sections 327 and 328 and the tax computed by reference to the representative concerns specified in section 328 and that your case was deemed closed.

In accordance with the above conclusions, your claim will be rejected.

The collector of internal revenue for your district will be officially notified at the expiration of thirty days from the date of this letter of the rejection.

Respectfully,

C. B. ALLEN,
Acting Deputy Commissioner.

Henry Prentiss & Co., Inc., New York. Recd. Jul. 17, 1925.
Answered by ——— ———.

104 *Petitioner's Exhibit 10*

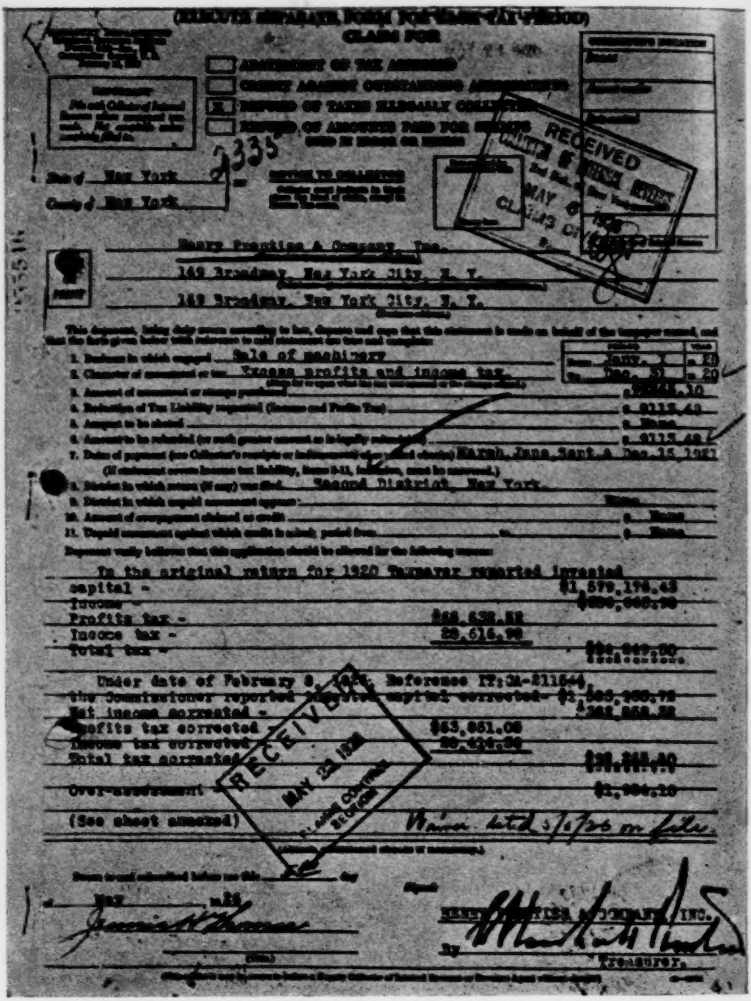
Address reply to Commissioner of Internal Revenue and refer to SOL:R:C1.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, February 23, 1926.

HENRY PRENTISS AND COMPANY, INC.,
149 Broadway, New York, N. Y.

SIRS: You are advised that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919 your application for special assessment. Some question has arisen as to the denial of special assessment. However, before a final decision is reached you will be granted an opportunity to be heard orally if you so desire. Accordingly you are requested to inform

PETITIONER'S EXHIBIT 13



CLAIM FOR

☐ ADJUSTMENT OF TAX ASSESSED

☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS

☒ REFUND OF TAXES ILLEGALLY COLLECTED

☐ REFUND OF AMOUNTS PAID FOR STAMPS USED BUT SPOILED OR ERRONEOUSLY AFFIXED TO DOCUMENTS

RECEIVED MAY 6 1925 CLAIMS DIVISION

State of New York, County of New York

Henry Prentice & Company, Inc.
149 Broadway, New York City, N. Y.
149 Broadway, New York City, N. Y.

1. Business in which engaged: Sale of machinery
2. Character of assessment or tax: Excess profits and income tax.
3. Amount of assessment or overpayment: $
4. Reduction of Tax Liability requested (Income and Profits Tax): $ 9115.48
5. Amount to be abated: $
6. Amount to be refunded (or such greater amount as is legally refundable): $ 9115.48
7. Date of payment (see Collector's receipts or indorsements on assessed checks): March, June, Sept. & Dec. 15, 1921
8. District in which return (if any) was filed: Second District, New York.
9. District in which unpaid assessment appears:
10. Amount of overpayment claimed as credit: $ None
11. Unpaid assessment against which credit is asked, posted from: $ None

Taxpayer verily believes that this application should be allowed for the following reasons:

In the original return for 1920 Taxpayer reported invested capital - $1,579,178.45
Income - $280,000.00
Profits tax - $68,638.82
Income tax - 20,614.98
Total tax - $89,253.80

Under date of February 8, 1924, Reference IT:AR-211544, the Commissioner reported invested capital corrected - $1,565,000.72
Net income corrected - $265,858.88
Profits tax corrected - $63,851.06
Income tax corrected - 20,414.50
Total tax corrected - $84,265.40

Over-assessment - $5,004.10

(See sheet annexed) Waiver dated 3/5/25 on file.

RECEIVED MAY 24 1926 INCOME TAX UNIT BUREAU

Sworn to and subscribed before me this 4th day of May, 1925

Jessie M. Thompson
(Seal)

HENRY PRENTICE & COMPANY, INC.
By [signature]
Treasurer.

this office within ten days from the date of this letter whether or not you desire such a hearing, otherwise the decision in the matter will be based upon the record as it now stands.

Respectfully,

A. W. GREGG,
Solicitor of Internal Revenue.

Henry Prentiss & Co., Inc., New York. Recd. Feb. 25, 1926.
Answered by ——— ———.

105 *Petitioner's Exhibit 11*

Address reply to the Solicitor of Internal Revenue, Washington, D. C., and refer to initials and number SOL:R:C1.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF INTERNAL REVENUE,
Washington, March 3, 1926.

HENRY PRENTISS & COMPANY,
149 Broadway, New York, New York.

SIRS: In response to the request set forth in your letter dated March 2, 1926, for an oral hearing in connection with your income and profits taxes for 1918 and 1919, you are advised that Monday, March 15, 1926, at 10.00 a. m., has been set for such hearing before the review division of the office of the Solicitor of Internal Revenue, in room 5026, Interior Building, Washington, D. C.

Respectfully,

P. C. ALEXANDER,
Assistant Solicitor.

Henry Prentiss & Co., Inc., New York. Recd. Mar. 6, 1926.
Answered by ——— ———.

107 Taxpayer was advised that the case would be forwarded for scheduling, but to date payment of over-assessment has not been received.

On the grounds given below taxpayer claims that its invested capital for 1920 should be recomputed and increased by the sum of $180,670.08.

With such adjustment in invested capital, the profits tax assessable will be	$53,725.51
Income tax assessable	29,426.41
Total tax assessable	83,151.92
Tax originally assessed	$94,249.50
Over-assessment	11,097.58
Amount of over-assessment previously allowed (Treasury Department letter February 8, 1926, reference IT:CA-2115-4)	1,984.10
Additional over-assessment claimed herein	$9,113.48

This claim for increase in invested capital is based upon facts presented and set forth in detail in sworn statement of taxpayer verified April 8, 1926, heretofore submitted to the office of the Solicitor of Internal Revenue in connection with application for relief for years 1918 and 1919 under sections 327 and 328.

A copy of such sworn statement is hereto annexed and made a part hereof.

As appears from such sworn statement, taxpayer on September 1, 1916, issued its stock of the par value of $500,000 for all of the
108 business, property, including contracts, good will, etc., of a predecessor New York corporation, Prentiss Tool & Supply Company. There was no change in interest.

Tangibles appeared on the books of the Prentiss Tool & Supply Company at $938,894.35 and were entered on the books of taxpayer at the same amount.

Actual cash value of tangible acquired for stock was $55,670.08 in excess of such amount. (See pages 8 and 9 of sworn statement and exhibits referred to therein.)

Intangibles—contracts, good will, etc.—did not appear on the books of Prentiss Tool & Supply Company, and no value was entered for same on books of taxpayer.

Actual cash value of intangibles acquired for stock was at least $1,404,384.75. (See schedules following page 15 of sworn statement and also supporting data as to existence and value of intangibles beginning page 11.)

Taxpayer's $500,000 par value stock was issued for both tangibles and intangibles, as appears from resolutions adopted by Prentiss Tool & Supply Company and by taxpayer. (Pages 27 to 31 of sworn statement.) This stock was issued for "business, property, and assets * * * including name, good will, contracts, and rights of every character and description," subject to debts.

In computing invested capital for 1920 taxpayer has not been allowed the actual cash value of intangibles acquired for stock or the excess actual cash value of tangibles so acquired.

109 Under section 326 taxpayer is entitled to have these values included in the computation of invested capital.

Tangibles transferred as per books	$938,894.35
Excess cash value of tangibles	55,670.08
Total actual cash value of tangibles transferred	$994,564.43
Value of intangibles transferred (see schedules following page 15 of sworn statement	1,404,384.75
Total cash value tangibles and intangibles acquired	2,398,949.13
Per cent tangibles to total value	41½%
Per cent intangibles to total value	58½%

58½% or $292,500 par value of the capital stock of taxpayer was issued for intangibles.

Additional invested capital to which taxpayer is entitled under section 326:

Excess value of tangibles	$55,670.08
Intangibles (maximum allowed by law, 25% of $500,000)	125,000.00
Total additional invested capital	$180,670.08

St. Louis Screw Company, 2 B. T. A. 649 at 658.

The same result is produced even though above intangible value is questioned, so long as intangible value of $331,521.47 is recognized. As to this there can be no question.

110 IT:CA:PYA–1–2.

HENRY PRENTISS AND COMPANY, INCORPORATED, *149 Broadway*, New York, New York.

Sirs: Your claim for refund of $9,113.48 tax paid for the year 1920 has been examined.

The basis of this claim is that you are entitled to include in your invested capital a paid-in surplus as at date of incorporation of $180,670.08, of which $55,670.08 is due to the revaluation of real estate based upon an appraisal and the balance to good will and other intangibles not set up on books.

You are advised that in accordance with Treasury Decision 3367 the appraisal can not be accepted for the determination of paid-in surplus, since it is based on opinion evidence of Mr. Ryer and Mr. Delatush and is unsupported by substantiating evidence. You are also advised that no paid-in surplus can be allowed with respect to intangibles.

Your claim will, therefore, be rejected. This rejection will appear officially on the next schedule to be approved by the commissioner.

C. R. NASH,
Assistant to the Comimssioner,
By (Signed) F. R. CLUTE,
Head of Division.

HSG–4.
Rejected. 7874. L. T. schedule.

111 *Petitioner's Exhibit 14*

Address reply to Commissioner of Internal Revenue and refer to IT:CA:PYA–1–2.
(Seal.)

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Sep. 25, 1926.

HENRY PRENTISS AND COMPANY, INCORPORATED,
149 Broadway, New York, New York.

SIRS: Your claim for refund of $9,113.48 tax paid for the year 1920 has been examined.

The basis of this claim is that you are entitled to include in your invested capital a paid-in surplus, as at date of incorporation, of $180,670.08, of which $55,670.08 is due to the revaluation of real

estate based upon an appraisal and the balance to good will and other intangibles not set up on books.

You are advised that in accordance with Treasury Decision 3367 the appraisal cannot be accepted for the determination of paid-in surplus, since it is based on opinion evidence of Mr. Ryer and Mr. Delatush and is unsupported by substantiating evidence. You
112 are also advised that no paid-in surplus can be allowed with respect to intangibles.

Your claim will, therefore, be rejected. This rejection will appear officially on the next schedule to be approved by the commissioner.

C. R. NASH,
Assistant to the Commissioner,
By F. R. CLUTE,
Head of Division.

Henry Prentiss & Co., Inc., New York. Recd. Sep. 27, 1926.
Answered by ——— ———.

113 *Petitioner's Exhibit 15*

In United States District Court, Southern District of New York

L. 40/387

HENRY PRENTISS & COMPANY, INC., PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

ANSWER

The United States of America, By Charles H. Tuttle, United States attorney for the Southern District of New York, answers the petition and complaint herein, as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 1 and 12 paragraphs of the complaint.

Second. Admits the allegations of the 2, 3, 4, 5, 8, 9, and 11 paragraphs of the complaint.

Third. It admits that in computing the income and excess-profits and war-profits taxes due from the petitioner for each of the three years ending December 31, 1918, December 31, 1919, and
114 December 31, 1920, the Commissioner of Internal Revenue refused to include in the invested capital of the petitioner the sum of $55,067.08, and also refused to include in invested capital the sum of $1,400,000; except as so admitted, it denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 6 paragraph of the complaint.

Fourth. Upon information and belief, denies each and every allegation of the 7 and 10 paragraphs of the complaint.

Wherefore, the United States of America demands judgment dismissing the complaint herein with costs.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant

Office and post-office address, U. S. Courts and old P. O. Bldg., Borough of Manhattan.

115 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Samuel C. Coleman, being duly sworn, deposes and says that he is the assistant United States attorney for the Southern District of New York, in charge of the within matter; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendant is that defendant is a corporation sovereign and body politic.

The sources of deponent's information and the grounds for his belief are records and correspondence of the Bureau of Internal Revenue.

SAMUEL C. COLEMAN.

Sworn to before me this 19th day of October, 1928.

ARMAND CHANKALIAN,
Notary Public, New York Co.

Clerk's No. 307, reg. No. 9163.
Commission expires March 30, 1929.

Defendant's Exhibit A

Exhibit 1

Henry Prentiss and Company, Inc.—Comparative statement of condition as of December 31, 1917 and 1918

	1917			1918			Increase	Decrease
ASSETS								
Property, plant, and equipment:								
Real estate, warehouse, Jersey City		$34,628.92			$34,628.92			
Warehouse equipment		2,900.77			2,902.57		$1.80	
Warehouse fixtures		1,506.86			1,564.36		57.50	
New York office fixtures		3,071.93			2,279.23			$792.70
Boston office fixtures		378.75			367.75			11.00
Buffalo, Rochester, and Syracuse office fixtures		2,893.35			2,799.35			
Automobile and truck account					4,882.27		4,882.27	
Total property, plant, and equipment			$45,380.58			$49,424.45	4,043.87	
Securities owned (Schedule A):								
Securities of other companies		480,348.15			448,791.44			31,556.71
U. S. Liberty loan bonds	$181,900.00			761,071.18			384,171.18	
Less: Bank liability	95,000.00	86,900.00		290,000.00	471,071.18			
Total securities owned			567,248.15			919,862.62	352,614.47	
Inventories and current assets:								
Inventories—								
New machines	79,804.77			92,684.66			12,879.89	
Second-hand machines	96,248.32			75,552.96				20,695.36
Repair parts	3,449.89			3,126.45				323.44
Materials and supplies	1,632.61			2,254.78			622.17	
Total inventories, including consignments (see contra)		181,135.59			173,618.85			7,516.74
Current assets—								
Cash on hand, home and branch office	6,743.64			7,539.72			796.08	
Cash in banks	294,902.10			330,740.24			35,838.14	
Notes receivable of customers	101,134.50			130,548.21			29,413.71	
Notes receivable of customers, past due	26,442.51			17,225.07				9,217.44
Accounts receivable, customers	1,273,241.29			1,202,416.28				70,825.01
Doubtful accounts receivable	393.90							393.90
Freight claims	546.43			594.58			48.15	
Loans secured by S. Hasbrook insurance policy	6,302.37							6,302.37
Protested or post-dated checks	203.96							203.96
Advances on account of purchase orders	91,035.73							91,035.73
Accounts due from officers, stockholders, and employees	11,904.71			1,280.79				10,623.92

U. S. certificate of indebtedness				165,000.00			165,000.00	
Sundry items in suspense				5,555.19			5,555.19	
Total current assets		1,812,851.14			1,860,900.08		48,048.94	
Total inventory and current assets			1,993,986.73			2,034,518.93	40,532.20	
Prepaid operating expense:								
Merchandise cartage			72.76			17.06		55.70
Total assets			$2,606,688.22			3,003,823.06	397,134.84	
117 CAPITAL AND LIABILITIES								
Capital stock:								
Common capital stock		$500,000.00			$500,000.00			
Preferred capital stock					250,000.00		250,000.00	
Total capital stock			$500,000.00			750,000.00	250,000.00	
Surplus (see Exhibit 2)			917,585.28			*1,664,400.35	746,815.07	
Reserves			97,145.53			78,831.99		18,313.54
Bond payable, Henry Prentiss			266,000.00					266,000.00
Current liabilities:								
Accounts payable (purchases)		731,433.50			459,630.76			271,802.74
Customer's advance payments		54,066.16						54,066.16
Due to officers, stockholders, and employes		25,755.99			32,379.95		6,623.96	
Taxes accrued					750.00		750.00	
Total current liabilities			811,255.65			492,760.71		318,494.94
Consignors (see Inventories, contra Schedule B)			14,701.76			17,803.01	3,128.25	
Total capital and liabilities			$2,606,688.22			$3,003,823.06	$397,134.84	

* Subject to deduction for Federal and excess-profits taxes for which no reserve has been set aside.

This statement is subject to our comments upon the examination.

Defendant's Exhibit B

Exhibit 1

Henry Prentiss and Company, Inc.—Comparative statement of condition as of December 31, 1918 and 1919

	1918			1919			Increase	Decrease
LIABILITIES AND CAPITAL								
Current assets and inventories:								
Current assets—								
Cash on hand and in home and branch offices	$7,539.72			$6,021.60				$1,518.12
Cash in banks	330,740.24			195,298.93				135,441.31
Notes receivable of customers	130,548.21			106,431.05				24,117.16
Accounts receivable	1,202,416.28			764,923.02				437,493.26
Notes receivable, past due	17,225.07			1,294.02				15,931.05
Accounts due from officers and employees	1,280.79			2,631.57			$1,350.78	
U. S. certificates of indebtedness	165,000.00			0.00				165,000.00
Sundry items in suspense	5,555.19			0.00				5,555.49
Freight claims	594.58			42.33				552.25
Total current assets		$1,860,900.08			$1,076,642.52			784,257.56
Inventories—								
New machines	92,684.66			71,746.94				20,937.72
Second-hand machines	75,552.96			103,110.71			27,557.75	
Repair parts	3,076.32			0.00				3,076.32
Total inventories		171,313.94			174,857.65		3,543.71	
Total current assets and inventories			2,032,214.02			$1,251,500.17		780,713.85
Securities owned (Schedule A):								
Securities of other companies		448,791.44			457,517.19		8,725.75	
U. S. Liberty loan bonds	761,071.18			833,266.38				
Less: Liability to banks	290,000.00	471,071.18		0.00	833,266.38		362,195.20	
Total securities owned			919,862.62			1,290,783.57	370,920.95	
Property, plant, and equipment:								
Real estate, Jersey City warehouse		34,628.92			32,758.90			1,870.02
Warehouse equipment		2,902.57			2,902.57			
Warehouse fixtures		1,564.36			1,407.96			156.40
New York office fixtures		2,279.23			3,700.28		1,421.05	
Boston office fixtures		367.75			447.00		79.25	
Buffalo, Rochester, and Syracuse office fixtures		2,799.35			1,396.10			1,403.25
Automobiles and trucks		4,882.27			6,528.42		1,646.15	
Total property, plant, and equipment			49,424.45			40,141.23		283.22

Prepaid operating expense:								
Merchandise cartage		17.06			0.00			17.06
Materials and supplies		2,304.91			0.00			2,304.91
Total prepaid operating expense			2,321.97			0.00		2,321.97
Total assets			$3,003,823.06			$2,591,424.97		$412,398.09
119 ASSETS								
Current liabilities:								
Accounts payable, trade	459,630.76			385,601.00				74,029.76
Accounts due to officers and employees	32,379.95			10,544.78				21,835.17
Taxes accured	750.00			0.00				750.00
Bank overdraft	0.00			27,320.50			27,320.50	
Total current liabilities		492,760.71			423,466.28			69,294.43
Consignors (see Inventories, contra Schedule B)		17,830.01			23,096.98		5,266.97	
Total liabilities			510,590.72			446,563.26		64,027.46
Capital:								
Capital stock—								
Preferred, authorized	250,000.00			250,000.00				
Less: Retired stock	0.00			14,000.00				
Issued and outstanding		250,000.00			236,000.00			14,000.00
Common, authorized and issued		500,000.00			500,000.00			
Total Capital Stock		750,000.00			736,000.00			14,000.00
Reserves, general		78,831.99			74,910.42			3,921.57
Reserve for Federal income and excess-profits taxes		533,676.51			43,375.24			490,301.27
Surplus (See Exhibit 2)		1,130,723.84			1,290,576.05		159,852.21	
Total capital			2,493,232.34			2,144,861.71		348,370.63
Total liabilities and capital			$3,003,823.06			$2,591,424.97		$412,398.09

This statement is subject to our comments upon the examination.

Defendant's Exhibit C

Exhibit 1

Henry Prentiss and Company, Inc.—Comparative statement of condition as of December 31, 1919 and 1920

	December 31, 1919			December 31, 1920			Increase	Decrease
ASSETS								
Current assets and inventories:								
Current assets—								
Cash on hand in home office	$4,721.60			$4,000.00				$721.60
Cash on hand in branch offices	1,300.00			1,700.00			$400.00	
Cash in banks	195,298.93			174,847.08				20,451.85
Notes receivable of customers	106,431.05			209,882.31			103,451.26	
Accounts receivable	764,923.02			368,419.60				396,503.42
Notes receivable, past due	1,294.02			39,930.58			38,636.56	
Accounts due from officers and employees	2,631.57			20,202.10			17,570.53	
Freight claims	42.33			0.00				42.33
Total current assets		$1,076,642.52			$818,981.67			$257,660.85
Inventories—								
New machines	$71,746.94			$99,463.34			$27,716.40	
Second-hand machines	103,110.71			196,629.30			93,518.59	
Total inventories		174,857.65			296,092.64		$121,234.99	
Total current assets and inventories			$1,251,500.17			$1,115,074.31		$136,425.86
Investments (Schedule A):								
Securities of other companies		$457,517.19			$631,749.69		$174,232.50	
U. S. Liberty loan bonds		833,266.38			611,516.38			$221,750.00
Total investments			1,290,783.57			1,243,266.07		47,517.50
Fixed assets:								
Real estate, Jersey City warehouse		$32,758.90			$35,173.90		$2,415.00	
Warehouse equipment		2,902.57			2,612.30			$290.27
Warehouse fixtures		1,407.96			1,267.17			140.79
New York office fixtures		3,700.28			4,319.80		619.52	
Boston office fixtures		447.00			411.50			35.50
Buffalo, Rochester, and Syracuse office fixtures		1,396.10			1,775.41		379.31	
Hartford office fixtures		0.00			644.10		631.79	
Automobiles and trucks		6,528.42			7,160.21		631.79	
Total fixed assets			49,141.23			53,364.39	$4,223.16	
Total assets			$2,591,424.97			$2,411,704.77		$179,720.20

Current liabilities:								
Accounts payable, trade	$385,601.00			$155,355.78				$230,245.22
Accounts due to officers and employees	10,544.78			8,166.30				2,378.48
Bank overdraft	27,320.50			7,785.91				19,533.59
Taxes accrued	0.00			9,880.55			$9,880.55	
Total current liabilities		$423,466.28			$181,189.54			$242,276.74
Consignors (see Inventories, contra Schedule B)		23,096.98			91,540.80		$68,443.82	
Total liabilities			$446,563.26			$272,730.34		$173,832.92
Capital:								
Capital stock—								
Preferred, authorized	$250,000.00			$250,000.00				
Less—Retired stocks	14,000.00			28,000.00			$14,000.00	
Issued and outstanding		$236,000.00			$222,000.00			$14,000.00
Common, authorized and issued		500,000.00			500,000.00			
Total capital stock		$736,000.00			$722,000.00			$14,000.00
Reserves, general		74,910.42			0.00			74,910.42
Reserve for Federal income and excess-profits taxes		43,375.74			94,249.50		$50,873.76	
Surplus (see Exhibit 2)		1,290,575.55			1,322,724.93		32,149.38	
Total capital			2,144,861.71			2,138,974.43		$5,887.28
Total liabilities and capital			$2,591,424.97			$2,411,704.77		$179,720.20

This statement is subject to our comments upon the examination.

122 In United States Circuit Court of Appeals for the Second Circuit

HENRY PRENTISS & CO., INC., APPELLEE

v.

UNITED STATES OF AMERICA, APPELLANT

Order omitting exhibits

On the annexed consent of the parties hereto it is

Ordered that the petitioner's Exhibits 1, 2, 4, 7, 12, 16, 17, and 18 need not be printed in the record herein, but the same may be referred to on the argument and shall be deemed as part of the record as if the same had been printed herein.

Dated, New York, September 21st, 1931.

MANTON, *U. S. C. J.*

Entry of the above order is hereby consented to.

Dated, New York, September 18, 1931.

JEFFERY & REDMOND,
Attorneys for Petitioner-Appellee.
GEORGE Z. MEDALIE,
Attorney for Defendant-Appellant.

123 In United States District Court

[Title omitted.]

Affidavit and order to show cause

Upon the annexed affidavit of Leon E. Spencer, assistant United States attorney for the Southern District of New York, verified January 31st, 1930, let the plaintiff, Henry Prentiss & Company, Inc., and/or his attorneys, Jeffery & Redmond, show cause at a stated term of the United States District Court for the Southern District of New York, for the hearing of motions to be held in the old Post Office Building, Borough of Manhattan, city of New York, on the 4th day of February, 1930, the opening of court on that date or as soon thereafter as counsel can be heard, why an order should not be made permitting the defendant above named to amend his answer to the plaintiff's petition by serving and filing an amended answer, a copy of which is annexed to this order to show cause; and in the meantime and until the hearing and the decision of the application under
124 this order, it is hereby ordered and directed that the above-entitled case, which now appears on the civil-jury calendar of this court, be not brought on for trial.

Sufficient cause existing for the granting of this order, service thereof on Jeffery & Redmond, attorney for the plaintiff, within two days after this date shall be deemed sufficient service.

Dated, New York, N. Y., January 31st, 1930.

ALFRED C. COXE, *U. S. D. J.*

In United States District Court

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss:

Leon E. Spencer, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of
125 New York and now has charge of the above-entitled action; that this action was brought by the plaintiff by the service of a petition in due form on the United States of America, defendant, on or about the 16th day of September, 1927; that thereafter and on or about the 19th day of October, 1928, that issue was joined by the service of an answer on behalf of the defendant; that in this action the plaintiff seeks to recover certain taxes alleged to have been erroneously paid to William H. Edwards, collector of internal revenue, for the years 1918, 1919, and 1920, the plaintiff contending that the Commissioner of Internal Revenue failed to allow on the audit of the taxpayer's returns sufficient amounts as invested capital for said years; that the plaintiff filed with the Commissioner of Internal Revenue a claim for refund for the year 1918 of the said taxes alleged to have been illegally collected, claiming relief under sections 327 and 328 of the revenue act of 1918; that the Commissioner of Internal Revenue on or about July 16, 1925, notified the taxpayer that his 1918 claim for refund would be rejected because the plaintiff's situation revealed no abnormality evidenced by gross disproportion between the tax computed without the benefit of sections 327 and 328 of the revenue act of 1918, and the tax computed by reference to the representative concerns specified in section 328; that the time within which the plaintiff could file a new claim for refund for the year 1918 expired June 16, 1924; that in the present action now pending before this court the plaintiff seeks relief differing from
126 the relief requested in the claim for refund filed for the calendar year 1918. In other words, the plaintiff contends now in this cause that he is entitled to increased invested capital pursuant to the provisions of section 326 of the revenue act of 1918, whereas in his claim for refund he requested relief under sections 327 and 328 of the revenue act of 1918.

That with respect to the calendar year 1919 the plaintiff's claim for refund was filed on or about April 28, 1925, and requested the Commissioner of Internal Revenue to refund the sum of $3,666.48 because

the plaintiff contended that the sum of $13,094.64 paid as taxes to the State of New York should be deducted from the gross income for the year 1919. The Commissioner of Internal Revenue allowed this deduction to the plaintiff. In this present action the plaintiff in so far as 1919 is concerned seeks to benefit by the provision of section 326 of the revenue act of 1918; in other words, on the ground not stated in the claim for refund.

Deponent further states that the answer as originally filed to the petition in the above-entitled action admitted among other things that "claims for all of said years for inclusion of said sum of $180,067.08 in invested capital have been denied by said commissioner"; that on January 3, 1930, deponent received a letter from the office of the General Counsel, Bureau of Internal Revenue, at Washington, advising that the present suit was brought on grounds other than those which had been before the Commissioner of
127 Internal Revenue; in other words, that the grounds as stated in the claims for refund for the years 1918 and 1919 differed materially from the grounds set forth in the plaintiff's petition in the above-entitled action; that thereupon deponent communicated this fact to the firm of Jeffery & Redmond, attorneys for the plaintiff, and subsequently served upon said attorneys a copy of proposed amended answer, a copy of which is annexed hereto, and requested that defendant be permitted to file said amended answer denying that the Commissioner of Internal Revenue had ever considered the question of the allowance of additional invested capital for the years 1918 and 1919. Said amended answer also contained a separate defense in so far as the year 1919 is concerned by stating that the plaintiff's claim for refund for the year 1919 was allowed and not rejected as stated in the original answer.

That in order to enable the defendant to make his defense in the above-entitled action, it is submitted, an amended answer should be permitted which will set forth the facts as they occurred, and that unless such amended answer is permitted the plaintiff undoubtedly will succeed in establishing relief which was not claimed in the claims for refund filed for the years 1918 and 1919 with the Commissioner of Internal Revenue. Deponent has been directed, by a letter received from the office of the General Counsel, Bureau of Internal Revenue, to insist on such defenses as are herein set forth. That the case is now on the civil-jury calendar, and a stay of the trial is
128 requested so that the court may have the opportunity of determining whether or not an amended answer may be served in this action.

Wherefore, deponent prays for an order staying the trial of the above-entitled case until the hearing on this application and for a further order permitting the defendant to file an amended answer in the above-entitled action, as hereinabove requested.

LEON E. SPENCER.

Subscribed and sworn to before me this 31st day of January, 1930.

ARMAND CHANKALIAN,
Notary Public, New York Co.

Clerk's No. 375, Reg. No. 1C335.
Commission expires March 30, 1931.

129 In United States District Court

[Title omitted.]

Affidavit in opposition to motion to file amended answer

STATE OF NEW YORK,
County of New York, ss:

William P. Jeffery, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiff, and I have full and complete personal knowledge of all the facts and circumstances surrounding this action. My knowledge arises from the fact that I represented the plaintiff in all its dealings with the defendant concerning the matters at issue in this action.

This action was instituted to recover taxes illegally assessed against and paid by the plaintiff for the years 1918, 1919, and 1920. It is based upon the failure of the Commissioner of Internal Revenue to increase the statutory invested capital of plaintiff for each of said years by the sum of $180,371. 08. Plaintiff claims that it was entitled to such increase for 1918 and to a similar increase plus resulting adjustments for the two succeeding years.

130 Paragraph 6 of the petition alleges its claim in the following language:

"6. That on or about the 1st day of September, 1916, petitioner acquired all the business, property, and assets, including name, good will, contracts, and rights of every character and description, of Prentiss Tool & Supply Company, a New York corporation, subject to the debts of said company, and issued in payment therefor all the capital stock of the petitioner of the par value of $100 each; that the actual cash bona fide paid in for said stock or shares, as aforesaid, and the actual cash value of tangible property other than cash bona fide paid in for such stock or shares at the time of such payment, as aforesaid, amounted to the sum of $994,564.43; that the actual cash value of the said name, good will, contracts, and rights of every character and description bona fide paid in for said stock or shares, as aforesaid, was $1,400,000.

"That included in the tangible properties so acquired by petitioner was certain real estate located in Jersey City, New Jersey, which was entered and carried on the books of the petitioner at an amount $55,067.88 less than the actual cash value of such property.

"That in computing the income and excess-profits and war-profits taxes due from petitioner for each of the years ended December 31,

1918, December 31, 1919, and December 31, 1920, the Commissioner of Internal Revenue has failed, neglected, and refused to
131 include in and as invested capital, and to allow same as paid-in surplus, in accordance with the provisions of the revenue act of 1918, the said $56,067.08, being the excess of the actual cash value of said real property over the value thereof appearing on the books of petitioner and over the value allowed therefor by the Commissioner of Internal Revenue in computing invested capital; that said commissioner has further failed, neglected, and refused to allow as and include in invested capital for said years ended December 31, 1918, December 31, 1919, and December 31, 1920, any part of the said sum of $1,400,000, the actual cash value of the name, good will, contracts, and rights of every character and description for which the capital stock of petitioner was issued in an amount in excess of $125,000, as aforesaid, whereas the said Commissioner of Internal Revenue should have included in said invested capital the said $55,067.08 as paid-in surplus, and $125,000, being twenty-five per cent of the par value of the total stock or shares of petitioner outstanding March 3, 1917. Thereby the invested capital of petitioner was understated in the sum of $180,067.08 by the Commissioner of Internal Revenue in the determination of income and excess-profits tax liability for each of said years."

The defendant answered said paragraph by paragraph third of the answer in the following manner:

132 "Third. It admits that in computing the income and excess-profits and war-profits taxes due from the petitioner for each of the three years ending December 31, 1918, December 31, 1919, and December 31, 1920, the Commissioner of Internal Revenue refused to include in the invested capital of the petitioner the sum of $55,067.08, and also refused to include in invested capital the sum of $1,400,000; except as so admitted, it denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of the 6 paragraph of the complaint."

The only matters alleged in paragraph 6 of the petition which were put at issue were the facts as to the acquisition of the properties of Prentiss Tool and Supply Co. and as to the values of said properties and that the plaintiff was entitled to the increase in invested capital alleged.

Paragraph 7 of the petition alleged that by reason of the refusal of the Commissioner of Internal Revenue to increase the invested capital as alleged the plaintiff was compelled to make overpayments of income and excess-profits taxes for the years 1918, 1919, and 1920. The allegations of this paragraph were denied by paragraph fourth of the answer.

It is then alleged in paragraph 8 of the petition:

"8. That petitioner duly filed claims for refund of overpayments of income and excess-profits taxes as aforesaid, pursuant to
133 the statutes of the United States made and provided, and pursuant to regulations of the Secretary of the Treasury pre-

scribed pursuant to said statutes, upon the ground that said taxes had been illegally and wrongfully assessed and collected."

The allegations of this paragraph 8 were specifically admitted by paragraph second of the answer.

Paragraph 9 of the petition, so far as material, alleges as follows: "That thereafter certain proceedings were had in connection with the determination of income and invested capital, and in connection with the determination of income and excess-profits taxes of petitioner for the years ended December 31, 1918, December 31, 1919, and December 31, 1920; * * * and petitioner's claims for all of said years for inclusion of said sum of $180,067.08 in invested capital have been denied by said commissioner; that two years have not elapsed since the denial and rejection of said claims for refund, and more than six months have elapsed since the filing thereof."

All the allegations of paragraph 9 were specifically admitted by paragraph second of the answer.

It is evident, therefore, that the only issues presented by the pleadings were whether the properties acquired by the plaintiff, as alleged, were of the values claimed and whether the Com-
134 missioner of Internal Revenue had acted wrongfully in refusing to increase the invested capital in the amount of $180,-371.08. These issues went to the merits.

The defendant admitted that plaintiff had complied with all the formalities required by section 3226 of the Revised Statutes (U. S. C., section 156), before bringing suit, to wit, the due filing of claims for refund with the commissioner of Internal Revenue according to the provisions of law and the regulations of the Secretary of the Treasury, the expiration of six months from the filing of such claims, and that such suit was begun within two years after the disallowance of the claims. It was likewise admitted that the relief sought in this action was demanded of the Commissioner of Internal Revenue and refused.

The present motion for leave to file an amended answer in effect seeks permission to withdraw its specific admissions of the facts alleged in paragraphs 8 and 9 of the complaint, and it would now deny that the plaintiff duly filed claims for refund for the years 1918 and 1919, seeking the inclusion of the sum of $180,067.08 in invested capital for said years, and it would now deny that claims of such nature for those years were ever denied by the Commissioner of Internal Revenue.

Defendant, by the proposed amended answer, now wishes to make the contention for the first time that plaintiff never requested of the Commissioner of Internal Revenue the relief which it now seeks in this action.

Whether this motion should be granted depends principally upon whether the moving papers set forth sufficient equitable
135 grounds for the relief asked. We insist that the affidavit upon which the motion is made is entirely lacking in that respect. That affidavit states substantially as follows:

That the plaintiff by this action seeks an increase of its invested capital under section 326 of the revenue act of 1918 and that the claims for refund for 1918 and 1919 did not seek such increase under section 326; "that on January 3, 1930, deponent received a letter from the office of the General Counsel, Bureau of Internal Revenue at Washington, advising that the present suit was brought on grounds other than those which had been before the Commissioner of Internal Revenue"; that if the motion is not granted "the plaintiff undoubtedly will succeed in establishing relief"; and that "deponent has been directed, by a letter received from the office of the General Counsel, Bureau of Internal Revenue, to insist on such defenses as are herein set forth."

We submit that under the law, the rules, and the decisions the defendant has shown no good reason why it should be permitted to amend at this time.

In order that this court may see the lack of equity in this application, I shall state some facts which are not contained in the moving affidavit.

It is true that the original claims for refund for 1918 and 1919 did not specifically ask for an increase of invested capital under section 326 of the revenue act of 1918. It is true that so far as 1918 is
concerned the Commissioner of Internal Revenue, by letter
136 dated July 16, 1925, notified plaintiff that its claim for relief under sections 327 and 328 "will be rejected." The Circuit Court of Appeals for the Second Circuit has held that such a letter does not constitute such a rejection as starts the statute of limitations running. (Michel v. U. S. Prentice-Hall Fed. Tax Service, 1930, vol. 1, par. 332.) I am informed and believe that the Commissioner of Internal Revenue took no other formal step by scheduling or otherwise to make such letter effective as a rejection or denial of the claim.

Whether such letter constituted a rejection or not is immaterial, because by letter dated February 13, 1926, the Solicitor of Internal Revenue advised plaintiff that he had before him for consideration its claim for refund for the year 1918 and that an oral hearing would be had if the plaintiff so desired. The plaintiff expressed a wish for an oral hearing, and on March 12, 1926, such oral hearing was had.

In my discussion of the merits of plaintiff's claim with the person in the solicitor's office in charge of the matter I was informed that, although there was doubt as to the right to relief under sections 327 and 328, it appeared that plaintiff was entitled to an increase of its statutory invested capital for the years 1918, 1919, and 1920 under section 326 of the law. It was suggested to me that I cause to be filed on behalf of plaintiff additional proof of the facts as to the value of the properties acquired by plaintiff from Prentiss Tool & Supply Co. on September 1, 1916.

137 Pursuant to the suggestion of the office of the solicitor, plaintiff executed on April 8, 1926, an application for relief under sections 326, 327, and 328. Such application was duly filed with the office of the solicitor. Such application contained all the facts and data upon which the present action is based.

Thereafter I was advised personally by the solicitor's office that plaintiff's claims were rejected. At no time was it suggested that the claims for refund were insufficient, but on the other hand all indications were that recomputation under section 326 was denied upon the merits. At that time the commissioner consistently took the position that in a case such as plaintiff's no allowance could be made in invested capital under section 326 for good will, exclusive agency contracts, or the value of tangible property in excess of its value set up on the books of the corporation. As a matter of fact, the commissioner denied this plaintiff a recomputation of its invested capital under section 326 for the year 1920, although the claim for refund for that year is conceded to have been sufficient.

The plaintiff instituted this action on September 16, 1927, pursuant to sections 762 and 763 of U. S. C. (24 Stat. 506). A copy of the petition was served upon the district attorney and upon the Attorney General. Since under the statute the duty is imposed upon the district attorney of appearing for the Government, it would seem that the requirement for service upon the Attorney General in Washington was inserted because the latter is at the source of all information in connection with a suit of this nature.

138 Although this suit was instituted on September 16, 1927, the answer was not interposed until one year and one month later, to wit, October 19, 1928. That answer admitted that the claims for refund were sufficient. During the pendency of this action I have had prolonged negotiations for settlement with the district attorney which have actually continued up to a short time ago. During all these negotiations the merits only were considered, no question having been raised as to the sufficiency of the claims. On the merits the district attorney has practically conceded that plaintiff is entitled to prevail, the affidavit attached to the order to show cause herein specifically stating that on the pleadings as they stand "the plaintiff undoubtedly will succeed" (p. 4).

The action appeared on the day calendar for trial on January 8, 1930, and has appeared almost daily since. On each appearance it was marked "Ready" until Monday, February 3, 1930, when the court was advised of this motion. It was not until January 27, 1930, that I was informed of defendant's desire to amend, and I refused to consent.

I had every reason to believe that the Commissioner of Internal Revenue was advised immediately upon the institution of this suit of its nature and of the claims made. We must assume that the

district attorney, before filing an answer, called for all information available to enable him to defend the action. We must assume that the claims for refund were put at his disposal. If they were, then he could see just as well then as now that the claims for 1918
139 and 1919 made no mention of section 326 of the revenue act and that the petition in this case mentions only section 326.

In the absence of any statements in the moving affidavit as to the reason why this defense was not interposed when the answer was filed this court may and should draw the following inferences:

That as soon as this suit was instituted, at any rate before the answer was filed, the Bureau of Internal Revenue collected and examined all the papers bearing upon plaintiff's claims for refund for 1918, 1919, and 1920, and learned of all proceedings in connection therewith; that the bureau saw that the claims for 1918 and 1919 did not mention section 326 of the revenue act and did not ask for increase of invested capital thereunder; that the bureau saw that the petitioner in this suit did mention section 326 and did ask for increase of invested capital thereunder; that the bureau knew whether or not the plaintiff's claim for increase of invested capital under section 326 had been considered and decided upon the merits; that the bureau knew from reading the petition and the claims for refund that there was this technical defense that the claims did not mention section 326; that the bureau advised the district attorney that on the merits the plaintiff, under section 326, was not entitled to an increase in invested capital and advised him to defend the suit on that ground; that the bureau, on January 3, 1930, two years and four months after the institution of suit, directed the district
140 attorney to attempt to raise this technical defense, only because it was then persuaded that plaintiff was legally entitled to an increase of invested capital under section 326.

Once the Government permits itself to be sued in its own courts, it becomes subject to the very same rules of equity, honesty, and fair dealing to which the individual suitor is subject. In a court of equity the Government will receive no more consideration than any individual.

Sec. 777 of U. S. Code (sec. 954, Rev. Stat.) provides that the court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

Rule 6 of the common-law rules of this court provides:

"In all cases not provided for by the rules of this court causes at common law shall proceed as nearly as may be in accordance with the law for the time being of the State of New York and the practice thereunder of the supreme court of said State."

Section 105 of the N. Y. civil practice act provides:

"At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the court * * *."

Neither under the provisions of these several enactments, nor
141 under the equitable power inherent in every court to prevent injustice is the defendant entitled to the favor which it now asks. The Supreme Court, in Eberly v. Moore (24 How. 149), has stated the reason for the exercise of the equitable power of permitting amendments:

"The equitable jurisdiction of the courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried."

In re Royce Dry Goods Co. (133 Fed. 100) the court said:

"Conformably to the spirit of this statute, the courts have always been and shoul be liberal in the allowance of any form of pleading to meet the ends of justice and prevent mere technical objections, to defeat justice."

By this application the defendant is begging this court to exercise its equitable powers. And to what purpose? "To prevent hardship and injustice, and that the merits of the cause may be fairly tried," as said in Eberly v. Moore (supra)? "To meet the ends of justice and prevent mere technical objections, to defeat justice," as said In re Royce (supra)? Is it not rather to permit mere technical
142 objections to defeat justice, to impose hardship and injustice and so that the merits of this cause may not be tried at all?

This plaintiff has been endeavoring for ten years to get the Government to see the justice and legality of its claim for relief. For ten years the Government refused to admit that plaintiff had any legal right to relief and now upon the eve of trial, knowing that upon the merits the plaintiff is entitled to recover, the defendant presents itself in a court of equity and seeks to interpose a mere technical defense which will do inequity if allowed.

In Salisbury v. Bennett (72 Fed. 743) the defendant sought leave to amend his answer by setting up the statute of limitations. The excuse given for not interposing this defense was that under the decisions of the State courts as they then stood defendant's counsel assumed that it was a defense which he could not establish and that there had been a recent decision holding that the defense could be established. The matter was heard before Judge Lacombe and he held that the old rule which discriminated against the defense of the statute of limitations as unmeritorious is not as strictly enforced as it once was and he also stated that the excuse given for not pleading the defense originally was a reasonable one. He went on to say, however:

"Nevertheless when application is made to the favor of a court for leave to interpose any defense, and the application is one resting in discretion, all the circumstances of the case will be con-
143 sidered, and care taken not to sanction any such abuse of procedure as would shock the conscience."

And he closed as follows:

"It would be so grossly inequitable to permit him thus to defeat the plaintiff's claim that his application should be denied."

Furthermore, under the decisions, the defendant's request may not be granted because, first, a defendant will not be allowed to file an amendment contradicting an admission made in his original answer unless for some persuasive reason, such as mistake or fraud; secondly, a defendant will not be permitted to amend when he knew of the defense which he wishes to interpose at the time his answer was drawn or might have discovered it by the exercise of reasonable diligence.

In Smith v. Athens (74 Hun 26, 28) it was said:

"The order denying leave to amend the answer was discretionary and the discretion was wisely exercised.

"The answer expressly admits the due execution of the contract. The alleged defects in the execution of the contract, if they exist, must have been well known to appellant when the answer was interposed. If they existed, the appellant clearly elected to waive them and defend the action upon the merits. To such election it should be held. To allow it first to admit and then, after reflection, to deny facts upon which the rights of parties rest, would not be in furtherance of justice."

144 In Diehl v. Robinson (35 Misc. 234, 235) the court said:

"I am convinced, from a careful consideration of the facts presented on this motion, that to allow the amendment permitting defendant to deny that which he has previously admitted, and upon which admission plaintiff has rested down to the present time, the case being on the day calendar for trial, would not be 'in furtherance of justice, as provided by section 723 of the code."

In Levy v. Delaware, Lackawanna & Western R. R. Co. (211 App. Div. 503, 505) the court said:

"By its original answer defendant admitted that it was a common carrier and operating a railroad between New York and Buffalo, and received the goods.

"In any matter which involves their individual rights, the parties may agree upon the existence or truth of certain facts which they wish to present to the court for adjudication. They may agree to a submission of a controversy upon an agreed statement of facts. (Civ. prac. act, 546.) If the parties are satisfied, the court will not concern itself whether these are the actual facts. They may so agree by admission in pleadings, in which case a party having once admitted facts alleged must abide by his admission, although he much desires to prove the contrary. (Kuester v. Paige Sales Co., 209 App. Div. 294, 296; Pennacchio v. Greco, 107 id. 225; Thompson
145 v. Postal Life Ins. Co., 226 N. Y. 363.) They may agree by stipulation not only upon the facts but upon the waiver of statutory or constitutional rights, and thereby make the law for their

proceeding, and thus become estopped from denying that there is another law applicable to their rights. (Vose v. Cockcroft, 44 N. Y. 415; Cox v. N. Y. C. &. H. R. R. R. Co., 63 id. 414; Matter of N. Y., L. & W. R. R. Co., 98 id. 447, 453; Cowenhoven v. Ball, 118 id. 231, 235.)

"Where a party has through inadvertence, mistake, or other cause made an admission or entered into a stipulation as to facts which are not true, there is, of course, power in the court to furnish relief in the exercise of sound judicial discretion upon good cause shown and in furtherance of justice. But where a party seeks to amend a pleading which has admitted facts, or to be relieved from a stipulation to the same effect which has been relied or acted upon by the other party, and to grant relief would prejudice substantial rights of the latter, the court should not exercise its discretion in thus changing the situation of the parties."

In Metropolitan Nat. Bank v. St. Louis Dispatch Co. (38 Fed. 57) it was said:

"The bill was one to foreclose a mortgage. The property covered by the mortgage was certain tangible property, such as type, printing presses, etc., the good will of the Dispatch newspaper, and
146 one share in the Associated Press. In all the prior bills the allegation was that the tangible property had long since been used up or destroyed * * *. Now, this amended bill changes entirely this fact, which has been adjudged a basal one, and alleges that that tangible property—the type, printing presses, etc.—is still in existence, and in the possession of the principal defendant * * *. Where an amended bill is sought to be filed which is based upon allegations contradicting those in the prior bill, those allegations being of substantial and basal facts, it seems to us the court may properly refuse to allow it to be filed. The bill is not stating new and additional facts; it is not alleging in a fuller or different way facts hitherto averred; it is not an amended bill, but it is a bill contradicting the basis upon which complainant sought to proceed. Motion to strike out will be sustained.

In 31 Cyc. 422, 423, the rule is stated as follows:

"As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts.

"The court will not ordinarily permit defendant to file an amended plea or answer when the matter of defense proposed
147 by the amendment was known to defendant when he filed his original plea, and no valid excuse is given for not including it therein."

In Pratt, Hurst & Co., Ltd. v. Tailer (99 App. Div. 236, 238) it was said:

"This affidavit is insufficient under the well-settled rule, which, as we have already stated, is that ordinarily a party will not be permitted to amend a pleading for the purpose of setting forth facts of which he had full knowledge at the time of interposing the original pleading, and that facts satisfactorily excusing the failure or neglect in not setting forth all the material facts in the original pleading must be shown. In the case at bar neither is it shown that the new facts sought to be set up in the amended complaint were not known to the plaintiff or its attorney in fact, nor is any explanation given of the omission to allege them originally. The plaintiff, therefore, failed to present a case warranting the granting of the amendment."

In Jacobs v. Mexican Sugar Refining Co., Ltd. (115 App. Div. 499) the court said:

"Notwithstanding recent decisions by which this court has indicated a policy of liberality in the allowance of amendments to pleadings in order that litigants may shape their issues as may seem best to them, yet it seems to me that the order in this case should
148 not have been made. The defense proposed to be inserted in the answer some eighteen months after the commencement of the action seeks to defeat the action by the present repudiation of a lease upon the ground that it was fraudulent in fact at the time it was made, because of the participation in the making of the lease by directors interested in the result. But in the original answer it asserts that it did 'in earnestness cancel said lease because of the default of the sugar company in paying the rent then due and payable to this company,' which was an acknowledgment of the original validity of the lease. It appears affirmatively that the officers of the company controlling it and making the affidavits upon which this motion was based were possessed of all the knowledge to enable them to set up the defense now sought to be interposed, not only when the original answer was served, but when the action was commenced, as they expressly so admit.

"I understand it to be well established that ordinarily a party will not be permitted to amend a pleading for the purpose of setting forth facts of which he has full knowledge at the time of interposing the original pleading, and that facts satisfactorily excusing the failure or negligence in not setting forth all the material facts in the original pleading must be shown."

In Jefferson v. Burhans (85 Fed. 924, 926) the court said that the amendment was properly refused "because by permitting
149 it an entirely new defense would be interposed, which was not suggested by the original answer, although the new defense must have been as well known to the defendant when the original answer was filed as when leave to amend the same was asked."

Judge Story, in Smith v. Babcock (3 Sum. 583), speaking on the subject, said:

"Considering the solemnity of answers, I should be sorry to see any practice introduced which should in any, the slightest degree encourage negligence, indifference, or inattention to the duties imposed by law upon parties who are called upon to make statements under oath. And it seems to me that, before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected or the facts to be added are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence, and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer was put in and sworn to."

Certainly the defendant has shown no reason why the principles stated in the foregoing authorities should not be applied here and should not defeat this application. The moving papers are
150 absolutely silent as to reasons why the defendant should be permitted to deny now what it has admitted for so long.

The affidavit simply states that on January 3, 1930, the general counsel, Bureau of Internal Revenue, advised deponent that this suit was brought on grounds other than those set up in the claims for refund. But when was that fact first discovered? If it was discovered prior to the filing of the original answer, and the defendant had 13 months to prepare that, there arises a conclusive presumption that defendant waived the technical objection.

If the fact was not discovered until January 3, 1930, two years and 4 months after the suit was instituted, there was such gross carelessness or negligence that a court of equity should not relieve it. Granted that the rules will not be strictly enforced against the Government in certain circumstances, still here is a case where the fact did not have to be learned from an investigation. It appeared on the face of the written documents. The most cursory examination of the claim and the petition would not have failed to disclose the fact that the petition proceeded under section 326 and the claims for refund did not mention that section. We have every right to assume that in the 13 months passing between the service of the petition and the execution of the answer, the defendant examined the claims for refund and the petition.

We most urgently insist that not only has the defendant failed to show any equitable grounds why it should be permitted now to amend its answer, but if the amended answer is permitted an
151 injustice will be done plaintiff. The defendant has consistently claimed that plaintiff is not entitled to recover upon the merits. Now that its viewpoint has changed and it admits that plaintiff is entitled to recover upon the merits, it wishes to defeat plaintiff at any cost by setting up a technical defense, which it has always known and which would prevent a trial of the merits of the case.

It is therefore respectfully requested that the motion of the defendant be denied.

WILLIAM P. JEFFERY.

Sworn to before me this day of February, 1930.

LILLIAN M. WINANS,
Notary Public, N. Y. County.

Clerk's No. 200, reg. No. 0-47.
Commission expires March 30th, 1930.

152 In United States District Court

[Title omitted.]

Order allowing filing of amended answer

Feb. 26, 1930

A motion having been regularly made by the above-entitled defendant, by way of order to show cause, in order that the above-entitled defendant be permitted to serve an amended answer to the complaint herein, on the ground that the answer as originally filed does not correctly state the facts, and the matter having come on to be heard before this court on the 7th day of February, 1930,

Now, after reading the complaint herein, the answer to the complaint, verified the 19th day of October, 1928, and the proposed amended answer to the complaint, verified the 25th day of
153 February, 1930, and after hearing Jeffery & Redmond, by Joseph F. Murray, of counsel for the plaintiff, in opposition to said motion, and Charles H. Tuttle, United States attorney for the Southern District of New York, by Leon E. Spencer, assistant United States attorney, in support of said motion, and due deliberation having been had, it is hereby

Ordered that the United States of America, defendant, be permitted to file an amended answer to the complaint herein.

ALFRED C. COXE, *U. S. D. J.*

Filed Febry. 27/30.

154 In United States District Court

[Title omitted.]

Petitioner's petition for and order allowing appeal

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Henry Prentiss & Company, Inc., the above-named petitioner, feeling itself aggrieved by a judgment made and entered herein on February 20, 1931, in the sum of $7,975.21, together with interest on

said sum from August 1, 1921, in favor of petitioner and against the defendant, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays for an order allowing it to prosecute said appeal, and to bring up for review upon such appeal the order dated February 26, 1930, and entered in the office of the clerk of this court on February 27, 1930, granting defendant's motion to file an amended
155 answer herein, and that a transcript of record and the papers and proceedings upon which the said order was made may be duly authenticated and sent to the Circuit Court of Appeals for the Second Circuit and that a citation be issued, as provided by law.

Dated, New York, May 15, 1931.

JEFFERY & REDMOND,
Attorneys for Petitioner.

Office & post-office address, 14 Wall Street, Borough of Manhattan, city of New York.

It is ordered that the appeal, as above prayed for, be allowed.

Dated, New York, May 15, 1931.

JNO. C. KNOX, *U. S. D. J.*

156 In United States District Court

[Title omitted.]

Assignment of errors

The petitioner, Henry Prentiss & Company, Inc., for its assignment of errors, respectfully alleges that:

1. The court erred in sustaining the objection of the defendant to the following question asked of the witness Jeffery:

"Q. Will you state what conversation was had between you and Mr. Lansforth at that time?"

2. The court erred in sustaining the objection of the defendant to any testimony of conversations between the witness Jeffery and Lansforth.

3. The court erred in making the findings of fact numbered VI and XXII at the request of the defendant, in that there was no evidence to support either of said findings.

4. The court erred in refusing to find as facts petitioner's proposed findings of fact numbered 17, 18, 19, and 26.

157 5. The court erred in holding as a matter of law that the petitioner's claim for refund seeking the recovery of 1918 income and profits taxes does not support in any wise the present suit, being defendant's conclusion of law No. 1, upon the ground that it is contrary to and against the evidence, and that the said claim for refund was in conformity with the statutes of the United States and the regulations of the Secretary of the Treasury, and that, if it was not, its sufficiency was waived by the defendant.

6. The court erred in refusing to make the conclusions of law requested by petitioner numbered 7, 8, 9, 10, 11, 12, 13, 15, and 16.

7. The court erred in granting the motion of defendant to serve an amended answer, and in making the order to that effect dated February 26, 1930, which was entered and filed February 27, 1930.

8. The court erred in not directing judgment in favor of plaintiff for the additional sum of $12,102.95 on account of taxes paid by it for the year 1918 in excess of the amount legally assessable against petitioner for said year, and in directing judgment in favor of the defendant on that issue.

Dated, New York, May 15, 1931.

JEFFERY & REDMOND,
Attorneys for Petitioner.

Office and post-office address, 14 Wall Street, Borough of Manhattan, New York City.

158 [Citation in usual form omitted in printing.]

159 In United States District Court

[Title omitted.]

Defendant's petition for appeal and order allowing same

To the Honorable the Judges of the United States District Court for the Southern District of New York:

United States of America, the defendant herein, by its counsel, now comes and says that on the 20th day of February, 1931, this court signed and entered its judgment in favor of the plaintiff in the sum of $7,975.21, with interest, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the defendant, all of which more fully appear from the assignments of error filed herewith.

Wherefore, United States of America prays that an appeal may issue in its behalf to the United States Circuit Court of Appeals for the Second Circuit, for the correction of the errors so complained of and that a transcript of the record, proceedings, and papers in
160 said cause, duly authenticated, may be transmitted forthwith to the United States Circuit Court of Appeals for the Second Circuit in accordance with the laws of the United States and that a citation be issued, as provided by law.

Dated, New York, N. Y., May 19, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

Office and P. O. address, U. S. Courts and P. O. Bldg., Borough of Manhattan, city of New York.

It is ordered that the appeal as above prayed for be, and the same hereby is, allowed.

Dated, New York, N. Y., May 19, 1931.

WOOLSEY, *U. S. D. J.*

161 In United States District Court

[Title omitted.]

Defendant's assignments of error

United States of America, defendant, by its counsel, now comes and in connection with its petition for appeal files the following assignments of error, on which it will rely on its appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment of the District Court entered on February 20, 1931.

First. The court erred in deciding the issues and giving judgment in favor of the plaintiff on the ground that the plaintiff was entitled to include in its invsted capital for income and excess-profits tax purposes, for the years 1918 and 1920, an amount of $107,000 as a value for intangibles.

Second. The court erred in deciding the issues and giving judgment in favor of the plaintiff for $7,975.21 on the ground that the plaintiff's claim for refund seeking the recovery of 1920 income
162 and profits taxes was duly filed as provided by section 1112 of the revenue act of 1926 (section 3228 of the Revised Statutes as amended).

Third. The court erred in deciding the issues and giving judgment in favor of the plaintiff for $7,975.21 on the ground that the "waiver" filed by the plaintiff on May 5, 1926, respecting income and excess-profits taxes due for 1920, extended the time within which the plaintiff could file a claim for refund for the return of 1920 income and excess-profits taxes.

Fourth. The court erred in deciding the issues and giving judgment in favor of the plaintiff on the ground at the time of the organization of the plaintiff any intangible property was bona fide paid in for any stock of the plaintiff.

Wherefore, the defendant prays that the judgment in favor of the plaintiff for $7,975.21 of the United States District Court for the Southern District of New York in this action be reversed.

GEORGE Z. MEDALIE,
Attorney for Defendant,
United States Attorney,
Southern District of New York.

Office and P. O. address, U. S. Courts & P. O. Bldg., Borough of Manhattan, city of New York.

163 [Citation in usual form omitted in printing.]

164 In United States District Court

[Title omitted.]

Stipulation as to transcript of record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, January 8th, 1932.

JEFFERY & REDMOND,
Attorneys for Petitioner-Appellant and Appellee.

GEORGE Z. MEDALIE,
U. S. Attorney,
Attorney for Defendant-Appellant and Appellee.

165 [Clerk's certificate to foregoing transcript omitted in printing.]

166 In United States Circuit Court of Appeals for the Second Circuit

No. 318, October term, 1931

Argued March 17, 1932. Decided April 11, 1932

HENRY PRENTISS & COMPANY, INC., PLAINTIFF-APPELLANT AND appellee

v.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT AND APPELLEE

Appeal from the District Court of the United States for the Southern District of New York

Action to recover taxes illegally assessed for the calendar years 1918 and 1920. Judgment for the plaintiff for part of the amount sought to be recovered. Both plaintiff and defendant appeal. Judgment reversed and remanded.

Jeffery & Redmond, of New York City (Joseph F. Murray and William P. Jeffery, both of New York City, of counsel), for plaintiff.

George Z. Medalie, U. S. atty., and Leon E. Spencer, asst. U. S. atty., both of New York City.

Opinion

Before MANTON, L. HAND, and SWAN, Circuit Judges

MANTON, Circuit Judge.

Plaintiff in this action seeks recovery for taxes overpaid in 1918 and 1920. It paid income and profits taxes for 1918 on a return to be due in the sum of $535,144.20. An additional assessment was

paid in the amount of $119,191.19. For 1920 its income and excess profits were computed on a return to be due in the sum of $92,265.40. Plaintiff's contention is that the 1918 and 1920 taxes have been overpaid in the respective sums of $12,102.95 and $7,975.21, as a result of the commissioner's failure to allow in each year a sufficient sum for invested capital. It is argued that the plaintiff should have been allowed in each year an increase of invested capital of $153,871.08. Of this sum, $46,371.08 represented an additional value for real estate, and $107,500 a value for intangibles, such as good will. Below, the plaintiff was denied any amount for the calendar year 1918 because of the insufficiency of the claim for refund filed for that period. For 1920 the court granted a recovery in the sum of $7,975.21. By stipulation the real estate is valued at $81,000 as of September 1, 1916. The defendant urges that the allowance for intangibles is not justified as a matter of law.

The plaintiff was organized in August, 1916, with an authorized capital stock of $10,000, which was issued to the Prentiss Tool & Supply Company, its predecessor in title. On the day after this stock was issued it was increased from $10,000 to $500,000 par value, and the 4,900 new shares were issued to the original stockholders. Thereupon all the property was transferred to the plaintiff. The stock, pursuant to a resolution therefor, was distributed pro rata to the stockholders of the old company, and the property passed from the old company to the plaintiff, so that the stockholders had the same interest as before. The closing balance sheet of the old company and the opening one of the new showed the same assets and identical items of capital and liability, except that the capital stock of the Prentiss Tool & Supply Company was $25,000 and the surplus $913,894.35, whereas the plaintiff's stock was shown as $500,000 and the surplus as $438,894.35. Neither balance sheet included any value for good will, and no such item was carried on the books of
167 either company. The capital and surplus immediately before and after this transaction was the same total sum.

Section 326 (a) of the revenue act of 1918 (40 Stat. 1092) provides, in the calculation of taxes, that in determining invested capital for any calendar year the taxpayer is entitled to include as such any amount representing a value for intangibles or good will if it represents, (a) an actual cash sum, paid in for stocks or shares; (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25% of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest. And section 327 (40 Stat. 1093) provides for the determination where the commissioner is unable to determine invested capital as provided in section 326. But section 327 requires a specific allocation as to shares issued for tangible and intangible property. From the balance sheet and this record it is very evident that no shares were issued by the Prentiss Tool & Supply Company or this taxpayer for intangible property. For taxation purposes, there may be no "write-

up" to increase invested capital. Here the plaintiff issued all its capital stock in the sum of $500,000 to the old company in exchange for its assets. The resolution of the old company provided that the stock be acquired from the plaintiff and distributed pro rata among its stockholders. There was no item for good will. The plaintiff received in exchange for its capital stock all the business property previously owned by the Prentiss Tool & Supply Company, but the capital stock was issued for the assets as they were then fixed and valued, as the financial statement indicated. While it is true that the plaintiff is a separate corporate entity and may have acquired the property of its predecessor at a value corresponding to the property's true value, it is also a fact that the Prentiss Tool & Supply Company in the resolution of its board of directors, August 25, 1916, wherein the transfers were provided for, offered to accept $490,000 par value of the stock in lieu of cash. At this time, apparently, there was no intention to write up an increased invested capital. The value was fixed by the financial statement and there no value was allocated to good will. We must conclude that the plaintiff issued capital stock for the property as it then stood. The good will followed the property and was no part of the consideration for which the stock was issued to the plaintiff. Good will is excluded unless it has been secured at a cost. (Red Wing Malting Co. v. Willcuts, 15 F. (2d) 626, 49 A. L. R. 459 (C. C. A. 8).)

In La Belle Iron Works v. United States (256 U. S. 377, 41 S. Ct. 528, 65 L. Ed. 998) the taxpayer acquired ore lands for which it paid the sum of $190,000 prior to 1904. The property appreciated so that during the period from 1912 to 1917 its actual value was upwards of $10,000,000. In 1912 the company increased the value of the ore lands on its books by adding thereto $10,000,000, which it carried as surplus, and during the same year it declared a stock dividend of $9,915,400. Theretofore its capital stock consisted of shares having a par value of $9,915,400. The stock dividend was accomplished by retiring its own stock and issuing one share of preferred and one share of common for each share retired. In its income-tax return for the calendar year 1917 it valued its invested capital at $26,322,-904.14, which included the write-up figure of $10,105,400. The commissioner reduced the company's invested capital to $16,407,507.14. The court held that invested capital was restricted to actual money, or its worth, expended. Cash and intangible property paid in are confined to such as were contributed for stock in the corporation. The taxing statute may not be construed as including within the definition of invested capital any marking up of the valuation of the assets upon the books to correspond with the increase in market value, or any paper transaction by which the new shares were issued in exchange for the old ones in the same corporation, but which were not in substance and effect a new acquisition of capital property by the company. (Hotel Wisconsin Realty Co. v. Comr., 47 F. (2d) 842 (C. C. A. 7); Golden Cycle Corp. v. Comr., 51 F. (2d) 927

(C. C. A. 10).) It is apparent that to include good will as invested capital the stock of the company must be specifically issued for the intangibles. It is not enough to issue it for the property generally which was taken over. Good will is an incident to the business of any going concern and may follow it and not be paid in for the stock of the acquiring company. (Lewis A. Crossett Co. v. United States, 50 F.(2d) 292 (Ct. Cl.); Landesman-Hirschheimer Co. v. Comr., 44 F. (2d) 521 (C. C. A. 6).)

168 The defendant does not dispute the undervaluation of the real estate. The claim filed for refund of taxes paid for the calendar year 1918 is disputed because of its insufficiency and inadequacy to support this claim for additional invested capital by reason of such undervaluation. The plaintiff, in its claim for refund asked for its allowance, stating that "it is entitled to relief under sections 327, 328 of the 1918 act." The relief to be granted under these sections concededly is not similar to that which is now sought in this suit. Section 1113 of the revenue act of 1926 (44 Stat. 116, now section 3226 of the Revised Statutes, as amended [26 U. S. C. A., § 156]) requires that the claim which is presented must be stated in the application to the commissioner, and the taxpayer can not base a recovery in the court upon an entirely different and distinct ground from that presented to the commisioner. (United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 51 S. Ct. 376, 75 L. ed. 1025; Lewis A. Crossett Co. v. United States, 50 F. (2d) 292 (Ct. Cl.).) The claim for refund made no reference to undervaluation of real estate and no reference was made to it until after the claim was rejected by letter of July 16, 1925. However, the commissioner's action did not appear on the rejection schedule until September 3, 1926. On April 12, 1926, the plaintiff filed an additional brief which is in effect an amended claim. Its first brief had been filed before rejection. There was a reconsideration by the commissioner of the claim after rejection, and it was then urged that there had been an undervaluation of real estate which should have been taken into consideration in determining invested capital. This was sufficient upon which to base a claim under section 326 as to the allowance for real-estate increases. This claim was reconsidered and disallowed. It was sufficient to advise the commissioner while the claim was under consideration of the reasons the plaintiff put forth then and now for its allowance.

The claims for undervaluation of the real estate will be allowed and the claims for intangibles disallowed. It follows that the judgment below will be reversed, with directions to the District Court to enter a judgment allowing recovery for both 1918 and 1920 taxes to the extent of the undervaluation of the real estate which resulted in an excess payment; the claims for allowance for intangibles are disallowed.

Judgment reversed, with directions to enter a judgment in conformity with this opinion.

169 In United States Circuit Court of Appeals Second Circuit

HENRY PRENTISS & CO., INC., PLAINTIFF-APPELLANT

vs.

THE UNITED STATES, DEFENDANT-APPELLANT

Judgment

Filed April 18, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed with directions to enter a judgment in conformity with the opinion of this court.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

170 [File endorsement omitted.]

171 [Clerk's certificate to foregoing transcript omitted in printing.]

172 Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following case No. 141, United States vs. Factors & Finance Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though fied in response to such writ.

[Indorsement on cover:] File No. 36931. U. S. Circuit Court of Appeals Second Circuit. Term No. 234. The United States of America, petitioner, vs. Henry Prentiss & Company, Inc. Petition for a writ of certiorari and exhibits thereto. Filed July 18, 1932. File No. 36931.

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CHARLES ELMORE CROPLEY
CLERK

No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on April 18, 1932 (R. 169–170), reversing the judgment of the District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 166–169) is reported in 57 F. (2d) 676. The opinion of the District Court (R. 53–70) is reported in 46 F. (2d) 159.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 18, 1932. (R. 169–170.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent filed a claim for refund of its 1918 taxes stating specific grounds. The respondent was notified that the claim would be rejected. After the expiration of the statutory period for filing claims for refund and while the Commissioner was reconsidering the first claim, respondent filed an additional brief or "application for refund" setting forth the grounds upon which the present suit was brought. The question is whether respondent has complied with the statutes requiring claims for refund to be filed within a specified period and providing that no suit may be maintained for the recovery of a tax unless a claim for refund has been filed.

STATUTES AND REGULATIONS INVOLVED

These are printed in the Appendix, pp. 9–12, *infra*.

STATEMENT

This was an action at law in the United States District Court for the Southern District of New York to recover alleged overpayments of income and excess profits taxes for the years 1918 and 1920.

The District Court's findings of fact appear as allowances of the parties' requests for findings. (R. 71–91.) From them, the testimony, and the exhibits, the following facts appear:

Respondent filed its income and excess profits tax return for the year 1918 on June 16, 1919, and paid the tax shown to be due. On March 25, 1924, it filed a claim for refund on the grounds that it had failed to accrue any New York State tax and that because of abnormal conditions affecting income and invested capital it was entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918. (R. 84, 97.) These are not the grounds urged in the present suit. (R. 88–89.) By letter dated July 16, 1925, the Commissioner informed the respondent that "your claim will be rejected" and that the Collector would be notified officially. The rejection schedule containing the rejection of the claim was not signed by the Commissioner until September 3, 1926. (R. 85, 102–103.)

After the letter of July 16, 1925, informing respondent that its claim was to be rejected, but before the rejection schedule was signed by the Commissioner, the Commissioner reconsidered respondent's claim for special assessment and oral hearings were held on March 15 and April 12, 1926. (R. 38, 104–105.) On April 12, 1926, an additional brief or "application for refund" was filed. (R. 34, 37–38.)

The basis of the present suit was that the Commissioner had failed to include in invested capital a part of the value of respondent's real estate and had failed to make any allowance for good will. (R. 2–7, 9.) The District Court held that as to the 1918 taxes[1] the claim for refund was insufficient in that it did not set forth "all facts" relied upon within the meaning of the statutes and regulations. (R. 55–56.) The Circuit Court of Appeals reversed, holding that while the original claim did not embrace the grounds for recovery urged in this suit, the brief filed on April 12, 1926, was in effect an amended claim sufficient to advise the Commissioner, while the claim was under consideration, of the reasons put forth by respondent for its allowance, and that it therefore complied with the statute. (R. 166–169.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the amended claim for refund filed on April 12, 1926, after the expiration of the statutory period for filing claims for refund, was a sufficient compliance with the statute to permit maintenance of this suit.

2. In reversing the judgment of the District Court.

---

[1] The 1920 taxes are not now in question.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with *Jonesboro Grocer Co.* v. *United States,* 66 C. Cls. 320, certiorari denied 280 U. S. 562; *Wausau Sulphate Fibre Co.* v. *United States,* 49 F. (2d) 665 (C. Cls.); *Swift & Co.* v. *United States,* 68 C. Cls. 97, 105, affirmed on another point, 282 U. S. 468; *Feather River Lumber Co.* v. *United States,* 66 C. Cls. 54, certiorari denied 279 U. S. 837; *Mutual Life Ins. Co.* v. *United States,* 49 F. (2d) 662 (C. Cls.), certiorari denied 284 U. S. 628. These cases all hold that a second or amended claim for refund is not a sufficient compliance with the statute and will not support a suit for the recovery of a tax where it is filed after the statute of limitations has run and when it sets up wholly different grounds from those relied upon in an original claim timely filed. See also *Art Metal Construction Co.* v. *United States,* 47 F. (2d) 558 (C. C. A. 2d), certiorari denied 283 U. S. 863; *Zeller* v. *United States,* 46 F. (2d) 1023 (C. C. A. 2d), certiorari denied 283 U. S. 863; *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d).

In the present case, after the Commissioner had notified respondent that he would reject the original claim, and before the rejection schedules had been signed, respondent filed the additional claim for refund. The fact that the Commissioner reconsidered his rejection and considered the second claim does not alter respondent's legal status. The

original claim did not state the grounds for refund advanced in this suit. The claim upon which this suit is based was filed after the expiration of the prescribed period for filing a claim for refund. The final action of the Commissioner was the rejection of the original claim. *Jonesboro Grocer Co.* v. *United States, supra; Wausau Sulphate Fibre Co.* v. *United States, supra.*

2. The decision below also seems to conflict in principle with the decision of this Court in *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, where it was held that the filing of a claim is a prerequisite to a suit and that the claim referred to by the statute is the claim asserted in the suit. The Court said that the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought. In the instant case the original claim gave no notice of the amount or nature of the claim for which the suit was brought. The second claim, upon which the suit was predicated, was not filed until after the statute had run. We believe that the statute requires that the claim which is the basis for the suit should have been timely filed.

While it is believed that the *Felt & Tarrant* case, *supra,* announced the proper principle to be applied in these cases, confusion results from decisions to the effect that defective claims for refund (as distinguished from general claims) may be amended after the running of the period of limita-

tions. *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147 (C. C. A. 2d); *Swift & Co.* v. *United States*, 67 Ct. Cls. 322. Further confusion is added by two recent decisions of the Court of Claims holding that a general claim for refund gives the Commissioner "jurisdiction" to refund an overpayment of taxes and stops the running of the statute of limitations, and that the general claim may be amended to state a specific ground at any time before the Commissioner makes his decision. *Factors' & Finance Co.* v. *United States*, 56 F. (2d) 902; *Memphis Cotton Oil Co.* v. *United States*, decided May 31, 1932, not yet reported but see C. C. H. (1932), Vol. III, p. 8887.[2]

In the case at bar the original claim was neither defective nor general, but was a wholly different claim from the second claim upon which the suit was based. It is believed that this Court should settle the law with respect to the sufficiency of supplemental claims filed after the running of the statute, in view of the existing confusion.

3. The question is of considerable importance in administering the Federal income tax laws, since it is one of frequent recurrence and is one which is not only involved in many cases now pending in

[2] The Government has filed a petition for certiorari in the *Factors, & Finance Co.* case (No. 141, October Term, 1932), and a petition will probably be filed by the Government in the *Memphis Cotton Oil* case. We respectfully suggest that the petitions be considered together and that, if granted, the cases be assigned for argument together.

the courts, but one which, as we are informed by the Treasury Department, may well arise in thousands of cases.

Under the decisions of the court below and the Court of Claims any claim, however old and whatever its basis, may now be amended, if it has not yet been passed on finally by the Commissioner, by filing a claim stating new grounds, and suit may then be brought thereon. Acceptance of the decision in the present case would leave the matter in confusion because of the conflict of decisions. Without a decision of this Court the Treasury Department is unable to determine the proper principle to apply in such cases.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1932.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 268:

> SEC. 252. That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342:

> SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:
>
> "SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue

within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918 * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during

the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. Sup. V, Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. Sup. V, Title 26, Sec. 156.)

Treasury Regulations 62:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1932

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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF THE SOLICITOR GENERAL SUBMITTING AFFIDAVIT OF LEON E. SPENCER

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 234

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF THE SOLICITOR GENERAL SUBMITTING AFFIDAVIT OF LEON E. SPENCER

On August 27, 1932, counsel for the respondent filed in this Court an affidavit in which it was stated that Leon E. Spencer, an Assistant United States Attorney, had agreed with counsel for the respondent that they would be notified if the Government decided to file a petition for certiorari in this case, and that this agreement had not been complied with.

Mr. Spencer has executed an affidavit, which is set out in full below. The original of this affidavit has been filed with the Clerk of this Court.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1932.

138858—32

AFFIDAVIT OF LEON E. SPENCER

STATE OF NEW YORK,
County of New York, ss:

LEON E. SPENCER, being duly sworn according to law upon oath deposes and says:

On April 11, 1932, the Circuit Court of Appeals for the Second Circuit handed down its opinion in the case of *Henry Prentiss & Co., Inc.* v. *United States.* The order for mandate was entered in the office of the Clerk of the Circuit Court of Appeals on April 18, 1932. On April 25, 1932, I spoke by telephone with Mr. Joseph F. Murray, of counsel for Henry Prentiss & Co., Inc., and requested that he consent to the entry of an order in the Circuit Court of Appeals staying the issuance of the order on mandate for ninety days, which would cover the time within which certiorari could be applied for. Mr. Murray consented to the entry of this order and made no request that he be advised if the Government intended to make an application for a writ of certiorari.

It is my recollection that at this time I asked Mr. Murray whether counsel for Henry Prentiss & Co., Inc., intended to apply for a review of the decision of the Circuit Court of Appeals, and that I was advised that that question had not been decided but that if the Government applied counsel for Henry Prentiss & Co., Inc., probably would take the same action.

Neither at this time nor at any other time did Mr. Murray ask that I advise him in case the Government decided to file an application for a writ of

certiorari, and at no time did I tell Mr. Murray that I would inform him of the action to be taken by the Government. I have read the affidavit which has been filed by Mr. Murray in the Supreme Court of the United States in which it is stated that I told Mr. Murray that I would advise him in case the Government decided to apply for a writ of certiorari. As I have stated above, I made no such statement and entered into no agreement to advise Mr. Murray of the Government's action.

(Signed) LEON E. SPENCER.

STATE OF NEW YORK,
County of New York, ss:

Subscribed to and sworn before me this 3rd day of September, 1932.

(Signed) ARMAND CHANKALIAN,
Notary Public.

[SEAL.] ARMAND CHANKALIAN,
Notary Public, New York Co.,
Clerk's No. 339, Reg. No. 3C426.

Commission expires March 30, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 234

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 25–27) is reported in 46 F. (2d) 159. The opinion of the Circuit Court of Appeals (R. 76–79) is reported in 57 F. (2d) 676.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 18, 1932. (R. 80.) Petition for a writ of certiorari was filed July 18, 1932, and granted October 10, 1932 (R. 80). Jurisdiction is conferred upon this Court by Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent filed a claim for refund of its 1918 taxes, stating specific grounds for refund. The respondent was notified that the claim would be rejected. After the expiration of the statutory period for filing claims for refund and while the Commissioner of Internal Revenue was reconsidering the first claim, respondent filed an additional brief or "application for refund" setting forth the grounds upon which the present suit was brought. The question is whether respondent has complied with the statutes requiring claims for refund to be filed within a specified period and providing that no suit may be maintained for the recovery of a tax unless a claim for refund has been filed.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix (pp. 14–22, *infra*).

STATEMENT

This was an action at law in the District Court for the Southern District of New York to recover alleged overpayments of income and excess-profits taxes for the years 1918 and 1920. Only the year 1918 is involved here. The District Court made findings of fact. (R. 33–41.) From these, the tes-

timony and the exhibits, the following material facts appear:

Respondent filed its income and excess-profits tax return for the year 1918 on June 16, 1919, and paid the tax shown to be due. An additional assessment was paid December 28, 1920. On March 25, 1924, it filed a claim for refund, stating as grounds for refund that it had failed to accrue any New York State tax and that because of abnormal conditions affecting income and invested capital it was entitled to special assessment. (R. 38, 43.) These are not the grounds urged in the present suit. (R. 40–41.) By letter dated July 16, 1925, the Commissioner of Internal Revenue informed the respondent that "your claim will be rejected" and that the Collector would be notified officially. The rejection schedule containing the rejection of the claim was not signed by the Commissioner until September 3, 1926. (R. 39, 45–46.)

After the letter of July 16, 1925, informing respondent that its claim was to be rejected, but before the rejection schedule was signed by the Commissioner, the Commissioner reconsidered respondent's claim for special assessment, and oral hearings were held on March 15 and April 12, 1926. (R. 18, 46–47.) On April 12, 1926, an additional brief or "application for refund" was filed (R. 16–18), which raised the issue relating to an adjustment of invested capital on account of an under-

statement of real-estate values. By stipulation, the brief which is respondent's Exhibit 12 (R. 16) was omitted from the Record (R. 58).

The sole ground upon which the present suit is based is that the Commissioner failed to include in the respondent's invested capital a part of the value of its real estate. The actual value of the real estate in 1916 was $81,000. The Commissioner allowed only $34,628.92. The District Court held that the claim for refund was insufficient in that it did not set forth "all facts" relied upon within the meaning of the statutes and regulations. (R. 26.) The Circuit Court of Appeals reversed this decision, holding that, while the original claim did not embrace the original grounds for recovery urged in this suit, the brief filed on April 12, 1926, was in effect an amended claim sufficient to advise the Commissioner, while the claim was under consideration, of the reasons relied on by respondent for its allowance, and that therefore there was a compliance with the statute. (R. 76–79.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the amended claim for refund filed on April 12, 1926, after the expiration of the statutory period for filing claims for refund, was a sufficient compliance with the statute to permit maintenance of this suit.

2. In reversing the decision of the District Court.

SUMMARY OF ARGUMENT

No suit for the recovery of taxes may be maintained unless a timely claim for refund, setting forth the grounds on which the claim is based, is filed with the Commissioner of Internal Revenue. The original claim complied with the statute but did not set up the ground which was afterwards incorporated in another claim, not filed within the statutory period, upon which recovery is sought in the present suit. The timely claim was an application for special assessment; the untimely claim was a demand for an adjustment in invested capital based on an undervaluation of real estate. The two claims were not related in any respect. A timely claim is not susceptible of amendment after the period of limitations has expired so as to give the taxpayer the right to bring suit on another and different ground. Conditions attached to the right given to sue the Government must be strictly observed. The statute does not enlarge the period of limitations in cases where the Commissioner has not rejected a timely claim. The second claim was a new claim. It was not filed within the time prescribed by statute, and this requirement was not waived.

ARGUMENT

Respondent's petition filed in the District Court alleged, among other grounds not here material, that the Commissioner of Internal Revenue failed to include in invested capital a part of the value of

respondent's real estate. (R. 2–3.) It is submitted that no recovery should be had in this suit because no claim for refund presenting this ground was filed with the Commissioner within the period prescribed by statute for filing such claims.

A suit can not be maintained for taxes illegally collected unless a claim for them has been filed within the time prescribed by law. *Savings Institution* v. *Blair,* 116 U. S. 200.[1] In the instant case the period within which a claim for recovery of an overpayment of the 1918 taxes could be filed expired in 1924. The application for refund setting forth the ground urged in the present suit was filed on April 12, 1926. A suit to recover these taxes, based on this ground, is therefore barred.

The taxpayer contended, and the court below held, that the application for refund of April 12, 1926, was in effect an amendment of the claim filed in time on March 25, 1924. This original claim stated two grounds on which recovery was sought, namely, the failure to accrue any New York State taxes and an application for special assessment under Sections 327 and 328 of the Revenue Act of 1918. The first of these has no relation to the ground urged in the present suit. The second

[1] See also *Jonesboro Grocer Co.* v. *United States*, 66 C. Cls. 320, certiorari denied, 280 U. S. 562; *Feather River Lumber Co.* v. *United States*, 66 C. Cls. 54; *Grays Harbor Motorship Corp.* v. *United States*, 71 C. Cls. 167, 45 F. (2d) 259; *Snead* v. *Elmore*, 59 F. (2d) 312 (C. C. A. 5th); *Art Metal Const. Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863.

ground relates to the so-called relief provisions of the Act which provide for a special method of assessment of excess-profits taxes in certain cases. In those cases the tax is computed without regard to the invested capital provisions of Sections 325 and 326 of the Revenue Act of 1918 and is determined by the ratio which the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income. Accordingly, the second ground likewise has no relation to the ground urged in the present suit. The court below recognized that the relief granted by allowing a special assessment is not similar to that which is sought in this suit. In an analogous case, *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, this Court said (p. 271) that an application for special assessment "has no relation to deductions from gross income on account of exhaustion or obsolescence of patents."[2] Similarly, the statute fails to disclose either expressly or by implication any relation between an application for special assessment and adjustments to statutory capital. Consequently, the claim filed April 12, 1926, must be regarded as an original claim and not as merely amendatory to the one which was filed in time.

[2] Other cases are *Jonesboro Grocer Co.* v. *United States*, *supra*; *Grays Harbor Motorship Corp.* v. *United States*, *supra*; *Feather River Lumber Co.* v. *United States*, *supra*.

The distinction between what may be amended and what may not is no doubt one of degree. *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d). The attempted amendment here so plainly departed from the original claim that it was clearly not within the class of permissible amendments.

Where a pleading is amended to allege a new cause of action the new cause is subject to a defense of the statute of limitations although the action was commenced before the statute ran. *Seaboard Air Line* v. *Renn,* 241 U. S. 290; *Union Pacific Railway* v. *Wyler,* 158 U. S. 285; *B. & O. S. W. R. Co.* v. *Carroll,* 280 U. S. 491. The situation here seems to be analogous. Recognition of a right to sue based upon an amended claim, filed after expiration of the statutory period, stating a new ground for refund, would involve a departure from the rule that where the United States consents to be sued a literal and meticulous compliance by the taxpayer with statutory requirements is imperative. See *United States* v. *Michel,* 282 U. S. 656; *Maas & Waldstein Co.* v. *United States,* 283 U. S. 583; *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342.

If notice on July 16, 1925, that the original claim would be rejected is equivalent to a rejection, recovery is barred for another reason. A claim for refund can not be amended after rejection but must be considered as a new claim. *Jonesboro Grocer*

Co. v. *United States, supra; Solomon* v. *United States, supra; Mutual Life Ins. Co.* v. *United States,* 72 C. Cls. 204, 49 F. (2d) 662, certiorari denied, 284 U. S. 628; *Wausau Sulphate Fibre Co.* v. *United States,* 72 C. Cls. 189, 49 F. (2d) 665. In the instant case the court below stated as its reason for not considering the second claim as a new claim the fact that it was filed prior to the final rejection of the first claim which was timely. But the statutory period within which claims may be filed is measured not by the period within which a claim timely filed is considered by the Commissioner but by the five-year period after the return was due or the four-year period after the tax was paid. The decision below would dispense with the statute in all such cases.

Some cases have held that if facts and reasons are stated in the claim the taxpayer need not mention a provision of law applicable to his claim, nor is he precluded from advancing in court a new reason or theory applicable to his claim, nor from amending a defective claim by submitting additional evidence to the Commissioner relating to the ground presented in the claim.[3] Those conditions

[3] See *Dreyfuss* v. *Lines*, 24 F. (2d) 29 (C. C. A. 5th); *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147 (C. C. A. 2d); *Swift & Co.* v. *United States*, 67 C. Cls. 322; *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (W. D. Ky.); *Union & New Haven Trust Co.* v. *Eaton*, 20 F. (2d) 419 (Conn.); *Wunderle* v. *McCaughn*, 38 F. (2d) 258 (E. D. Pa.).

are not present here. No reference to the real estate item is found in the original claim.[4] The only claim upon which a timely suit could have been brought was the original claim, but, as the ground there stated is not the ground urged in the present suit, recovery is barred.[5] The facts disclose no waiver by the Commissioner which would bring the case within the rule of *Tucker* v. *Alexander*, 275 U. S. 228. By letter dated July 16, 1925, the Commissioner informed the respondent that "your claim will be rejected" and that the Collector would be notified officially. This referred to the claim for special assessment for that was the only claim before the Commissioner. Thereafter the Commissioner reconsidered respondent's claim and oral hearings were held on March 15 and April 12, 1926. On April 12, 1926, an additional brief or application for refund was filed. On September 3,

[4] The effect of a general reservation of rights and claim of illegality appearing in an application for refund is discussed in the Government's brief filed in the case of *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932.

[5] *United States* v. *Felt & Tarrant*, *supra*; *Bemis Bros. Bag Co.* v. *United States*, 60 F. (2d) 944 (C. C. A. 8th); *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d) 626 (C. C. A. 8th); *Snead* v. *Elmore*, *supra*; *J. P. Stevens Engraving Co.* v. *United States*, 53 F. (2d) 1 (C. C. A. 5th); *H. Lissner Co.* v. *United States*, 52 F. (2d) 1058 (Ct. Cls.); *Solomon* v. *United States*, *supra*; *J. H. Williams & Co.* v. *United States*, 46 F. (2d) 155 (E. D. N. Y.); *Taylor-Lockwood Co.* v. *United States*, 71 C. Cls. 360, 45 F. (2d) 284.

1926, the Commissioner signed the schedule containing the previously rejected claim.

The Commissioner's reconsideration of the claim for special assessment so as to afford the taxpayer an opportunity to present additional evidence in support of the claim may not be construed as allowing a new claim presenting a different ground for recovery to be filed after the statute had run. Such reconsideration merely indicated the Commissioner's willingness to postpone scheduling the rejection during the presentation and consideration of additional evidence on the grounds for refund set forth in the original claim. The respondent offered evidence to show that the new issue was discussed and considered in the conference. This offer of proof was rejected and an exception taken. (R. 17–18.) The court below took cognizance of the rejected testimony and held that this was sufficient upon which to base a claim under Section 326 of the Revenue Act of 1918 as to the allowance for real estate increases. This view overlooks the fact that the original claim was reconsidered solely to afford the taxpayer an opportunity to present additional evidence bearing upon the application for special assessment. A discussion or even an examination at that time into the merits of the barred claim did not in any manner affect the taxpayer's legal status. *Jonesboro Grocer Co.* v. *United States, supra; Lewis A. Crossett Co.* v. *United States,* 72 C. Cls. 292, 50 F. (2d) 292. Nor does the Commissioner's admission, in the answer to the taxpayer's petition,

that he refused to include in invested capital the real estate item, constitute a waiver of a compliance with the statute. In the absence of statutory authority the Commissioner cannot waive the period prescribed for suits against the Government. *Finn* v. *United States,* 123 U. S. 227; *Art Metal Const. Co.* v. *United States, supra,* certiorari denied, 283 U. S. 863; *Bemis Bros. Bag Co.* v. *United States,* 60 F. (2d) 944 (C. C. A. 8th). Since the new claim filed after the statute had run was not an amendment of the original claim, the Commissioner could not waive compliance with the statute. The waiver alleged dispenses not with formalities in compliance with the law but with the law itself. The Commissioner may not waive the conditions upon which the United States consented to be sued.

The facts here are not like those in *Tucker* v. *Alexander, supra.* There the claim set forth two grounds of illegality and when the action came on for trial the tax was contested upon a third. The Government's counsel at the trial stipulated that if the Commissioner's deduction of a return of capital was erroneous, the petitioner should have judgment. Thus all other questions, including the question of the sufficiency of the claim for refund to support suit on the new theory, were taken out of the case by stipulation. This took place before the time had expired for filing a claim for refund based on the third ground. This Court said (p. 232):

> Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here.

In the present case it does not appear that any conduct by the Commissioner misled the respondent into allowing the time for filing a proper claim to expire. When the amended claim was filed it was already too late. None of the considerations which suggest that a formal stipulation in the course of trial waiving compliance should be given full effect, have any application here. Throughout this litigation the Commissioner has consistently maintained that the respondent did not comply with the statutory requirements and that the suit must fail for that reason.

CONCLUSION

The decision of the court below is erroneous and should be reversed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1091, 1092, 1093:

SEC. 325. (a) That as used in this title—

The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trade-marks, trade-brands, franchises, and other like property;

The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdi-

vision (a) of section 326, section 330, and section 331.

(b) For the purposes of this title, the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares.

SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when

required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided,* That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the

representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

Revenue Act of 1921, c. 136, 42 Stat. 227, 268:

SEC. 252. That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342:

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281

of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 116:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918 * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively,

immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. App., Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enact-

ment of the Revenue Act of 1924. (U. S. C. App., Title 26, Sec. 156.)

Treasury Regulations 62:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

At the argument of this case on December 9, 1932, the respondent presented to the Court, both orally and in its brief, a point which, in the view of the petitioner, is not included within the questions to be reviewed under the writ, and which, for that reason had not been prepared or discussed by the petitioner in its brief. As the brief of the respondent was not filed until the day the argument began, the petitioner was unable to file a reply brief on the point, and for that reason this Court granted leave to the petitioner to present its views upon the point involved.

STATEMENT

In addition to the facts set out in the petitioner's main brief (pp. 2–4) the following facts are pertinent to the present issue. These facts are conceded by the respondent in its brief (pp. 29–31):

The respondent was organized in August, 1916, with an authorized capital stock in the par amount of $10,000. (R. 39.) This stock was issued to the Prentiss Tool & Supply Company for 100 shares of stock of the Atchison, Topeka & Santa Fe Railway Company. (R. 40.) Immediately thereafter the capital stock of the respondent was increased to $500,000 par value (R. 40), and the remaining 4,900 shares were issued to the Prentiss Tool & Supply Company for all of its property and assets. (R. 40.) This stock was distributed *pro rata* to the stockholders of the old company (R. 24) so that after the transaction the interests of the stockholders were the same as before. The respondent corporation was organized for the purpose of acquiring the property and business of the Prentiss Tool & Supply Company (R. 23) and at the direction of the latter, issued its stock to the stockholders of the Prentiss Tool & Supply Company. (R. 24.)

The assets of the old company were transferred from its books to the books of the respondent at the same figures, with the exception of the necessary adjustment in capital and surplus. No item was shown on the books of either company, or on the balance sheets prepared at the time of the transfer

covering the intangible assets here involved. (R. 40.) The intangibles had a value in excess of $300,000 (R. 21) but the parties have stipulated that if any sum should be included in the respondent's invested capital on account of these intangibles, it should not exceed $107,500 in amount. (R. 21.)

The Commissioner of Internal Revenue, in computing the respondent's invested capital for the years 1918 and 1920, did not include any amount on account of the acquisition by the respondent of the intangibles from the Prentiss Tool & Supply Company. (R. 21.)

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 21–24.

ARGUMENT

I

THE JURISDICTION OF THIS COURT TO REVERSE THE JUDGMENT AT THE INSTANCE OF THE RESPONDENT

The question which the respondent has argued in its brief with respect to its invested capital is not related in any way to the question presented by the Government in its petition for certiorari. It is a wholly distinct contention involving a different taxable year. The respondent did not file a petition for certiorari, and for this reason we respectfully suggest that this Court is without jurisdiction to review this part of the judgment below.

The respondent, in presenting this question, is not merely defending the judgment below; it is attacking the judgment. The respondent is not seeking to support the judgment on a ground rejected by the court below; it is seeking to have the judgment reversed.

This Court has decided that a respondent or appellee, who has taken no steps to have a judgment against him reviewed, may not *attack* that judgment in this Court. In *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, this Court said:

> It is true that a party who does not appeal from a final decree of the trial court can not be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

This decision has not been overruled, and the cases upon which the respondent relies do not conflict with it.

In *Langnes* v. *Green*, 282 U. S. 531, this Court decided that a respondent in certiorari might advance in this Court, *in support of the judgment*, a ground which had been rejected by the court below. In reaching this result it cited and quoted with apparent approval from the opinion in *United States*

v. *American Railway Express Co.*, 265 U. S. 425, *supra*. See also *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 560. This Court was not called upon in any of the cases cited to decide whether a respondent may attack the judgment below although he has filed no cross-petition for certiorari. Any language in the opinion in the *Langnes case* which might seem to relate to this question must be taken in the light of the fact that the *Langnes case* arose in admiralty, and, as this Court recognized in its opinion, an appeal in admiralty is a trial *de novo*.

The present case is an action at law. Under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, the writ of certiorari which this Court has granted on the petition of the United States brings the case before this Court "for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." Under this statute it is plain that this Court's jurisdiction is the same as it would have been if the case had been brought here by the United States by writ of error or appeal. This Court has frequently decided that an appellee or a defendant in error may not attack the decree or judgment below, and we submit that these decisions, under the statute quoted above, are controlling here.

In *Fitchie* v. *Brown*, 211 U. S. 321, the point was directly decided by this Court. Counsel for the

appellees was permitted to file a brief and to argue against the decree below, "this court stating, however, that it would thereafter decide whether counsel for executors [appellees] had any right to be heard to contend against the decree of the court below." (P. 328.) The question was thus squarely presented for decision, and this Court disposed of it as follows (p. 329):

> We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients.

A similar result was reached in *Peoria Ry. Co.* v. *United States,* 263 U. S. 528, where this Court said (p. 536):

> But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered.

Another decision to the same effect is *Terminal R. R. Assn.* v. *United States,* 266 U. S. 17, 28–29. See also *The Maria Martin,* 12 Wall. 31, 40; *The Stephen Morgan,* 94 U S. 599; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 527; *Bolles* v. *Outing Co.,* 175 U. S. 262, 268; *United States* v. *American Railway Express Co.,* 265 U. S. 425, 435, *supra.*

As all of these cases were decided prior to the enactment of the Act of February 13, 1925, the statute, under familiar principles, must be taken

to adopt and incorporate the rule which they establish. We have been unable to find any case in which this Court has held that it has jurisdiction to review a judgment or decree at the instance of a party who has not sought review by this Court by appeal, writ of error, or certiorari.

That this Court decided no more in *Langnes* v. *Green,* 282 U. S. 531, *supra,* than that the respondent may urge any ground in *support* of the decree below, even though he has filed no petition for certiorari, is, we believe, made clear by the decision in *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 560, where this Court said:

> But respondents do not invoke that ground in order to overthrow the judgment of the court below, but to sustain it; and this they may do. *Langnes* v. *Green, ante,* p. 531.

For these reasons we submit that this Court is without jurisdiction to review the judgment below at the behest of the respondent, so far as the respondent seeks to have that judgment reversed. Any arguments which the respondent presents in support of the judgment below are, of course, open to him, under this Court's decision in *Langnes* v. *Green.*

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II

WHERE A GOING BUSINESS IS ACQUIRED BY A CORPORATION ORGANIZED FOR THAT PURPOSE AND THE ASSETS TRANSFERRED INCLUDE INTANGIBLE PROPERTY SUCH AS NAME AND GOOD WILL, FOR WHICH NO PAYMENT IS SPECIFICALLY MADE EITHER IN CASH OR STOCK, SUCH INTANGIBLES MAY NOT BE INCLUDED IN THE INVESTED CAPITAL OF THE SUCCESSOR CORPORATION

The record shows that the respondent was organized for the purpose of acquiring the going business of the Prentiss Tool & Supply Company. In effect the transaction was nothing more than a change of name with increased capitalization as the stock of the respondent was issued to the stockholders of the Prentiss Tool & Supply Company *pro rata* according to their former holdings, their interests remaining the same.

It is unquestionably true, and doubtless will be conceded by the respondent, that the transferror corporation could not have increased its invested capital by including therein the value of its intangible property such as name, good will, and sales contracts which had grown up with the business and which therefore had been acquired at no cost to that corporation. *La Belle Iron Works* v. *United States,* 256 U. S. 377. It is contended, however, that because of the transaction here involved, which, as stated above, resulted in nothing but a change of name with increased capitalization, the respondent is entitled to include these intangible assets in its invested capital.

The Prentiss Tool & Supply Company carried no items on its books reflecting a valuation of these intangibles and none was entered on the books of the respondent corporation. After the transfer of the assets had been effected the respondent entered on its books without change the identical assets which had been carried on the books of the predecessor corporation, making the necessary adjustments in capital and surplus due to the increased capitalization. Neither the balance sheet of the predecessor corporation nor the balance sheet of the successor corporation at the time of the transfer showed any item for the intangible assets referred to. The book value of the tangible assets both before and after the transfer was $938,894.35 and the actual cash value of the tangible assets was $994,564.43, or $55,067.08 in excess of the book value. (R. 2.) As stock of the new corporation, having a par value of only $490,000, was issued for all of the assets of the old corporation, it is apparent that the value of the tangible assets was in excess of the par value of the stock paid for the entire business leaving nothing to be applied in payment for the intangible assets.

It is the position of the petitioner in this case that intangible property may be included in invested capital in the situation here presented only where actual payment in cash or stock was specifically made for such intangibles and that unless

the bill of sale or the closing and opening balance sheets reflect the value of the intangibles they may not be included in the invested capital of the successor corporation. In other words, the parties to the transaction must have been consciously dealing with the intangible property as well as the tangible property, and the mere acquisition of those intangibles which are the necessary incidents of a going business is not sufficient to permit their inclusion in invested capital.

The respondent here endeavors to show that the parties were consciously dealing with the intangibles as well as the tangibles by referring to the resolutions of the two corporations at the time of transfer. While by these resolutions (R. 22, 24) one corporation agrees to sell and the other corporation agrees to purchase the "business property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000," it is apparent that this language is intended merely as authorization by the stockholders of the respondent corporation to acquire a going business and authority by the Board of Directors of the predecessor corporation to sell its entire business. There was no attempt to place a valuation upon either the tangible or intangible property, the agreement being merely on the part of one corporation to acquire and on the part of the other to sell everything connected with the business for the lump

sum of $490,000, the stock in the new corporation to be accepted in lieu of cash.

Authority for including or excluding an asset as a part of invested capital must be found in the statutes. *Strong Publishing Co.* v. *Commissioner*, 56 F. (2d) 550 (C. C. A. 7th). "Invested capital" is a term of statutory concept and only those items which are specifically named in the statute may be included therein. *La Belle Iron Works* v. *United States, supra.* Section 326 (a) (4) of the Act (*infra*, p. 22) provides for the inclusion of intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such intangibles at the time paid in, (b) the par value of the stock or shares issued for such property, or (c) in the aggregate 25 per cent of the par value of the total stock of the corporation outstanding on March 3, 1917, whichever is lowest.

It is plain that before any allowance for intangible property may be made the three elements or factors named in the statute must be present. In this case the provisions of the statute have not been satisfied, as the intangible property was not bona fide paid in for stock or shares. If it be assumed, for purposes of discussion, that such property was bona fide paid in for stock or shares, it would still be impossible to determine what amount should be included in invested capital because of the acquisition of these intangibles. In determining the value at which intangible property bona fide paid in for

stock or shares may be included in invested capital, it is essential that all three restrictions be considered in order to determine the lowest figure at which the intangibles may be included, and if the facts applying to any one of the restrictions is lacking it is impossible to make the inclusion under the clear terms of the statute. Here the facts applying to restriction (b) are absent, as no stock was issued specifically for the intangible assets. Therefore, one of the three requirements necessary for consideration under the statute is absent. This failure to prove a fact necessary to establish the illegality of the tax is fatal to the taxpayer's contention. *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357.

In the case at bar where the transfer was made of a going business with all of its incidents for a lump sum without the allocation at time of sale of any part of the amount paid to either tangible or intangible property, it is clear that the payment was made for a mixed aggregate of both tangible and intangible property. In such a situation it is impossible to determine statutory invested capital because of the restrictions in the statute against granting any allowance for the intangible property paid in. However, Congress has carefully provided against hardships on the taxpayer in this situation by enacting Section 327 of the Revenue Act of 1918 (*infra,* pp. 23–24), permitting the Commissioner of Internal Revenue to grant special assessment to those taxpayers whose invested capital could not be determined under Section 326 and

where their excess-profits tax was disproportionate to that of other taxpayers engaged in a similar business.

As stated by the respondent the Board of Tax Appeals has held that where a mixed aggregate of tangible and intangible property is acquired for stock or shares, the par value of the stock may be apportioned between the two classes of property in proportion to their respective actual values at the time of transfer. This results in the inclusion of a portion of the intangibles in invested capital with a corresponding increase in the allowance for tangibles as paid-in surplus. The first decision on this point was the *Appeal of the St. Louis Screw Company,* 2 B. T. A. 649. That case was decided by the Board September 8, 1925, and the Commissioner of Internal Revenue acquiesced therein.

The courts to which this question has been presented have not been uniform in their decisions.

In *Lewis A. Crossett Company* v. *United States,* 72 C. Cls. 292, the situation of the parties was very similar to that in the instant case. The plaintiff at the time of its organization acquired all of the assets of every name, kind, and character of Lewis A. Crossett, Inc., including good will, trade-marks, trade-names, and both tangible and intangible personal property, and issued and paid therefor $749,000 par value of its stock. The transfer was made upon an agreed balance sheet which did not list

any item for the intangible property transferred, and the value of the tangible assets was in excess of the par value of the stock paid for the entire business.

In that case, as here, the plaintiff contended that it was entitled to include in its invested capital the value of the intangible property received, as restricted by the statute, and based upon an allocation of the stock pro rata to the tangible and intangible property acquired. As a basis for its contention the plaintiff relied upon the case of the *St. Louis Screw Company, supra,* before the Board of Tax Appeals.

In rejecting the plaintiff's contentions the Court of Claims said (p. 299):

> The good will which the statute authorizes to be included in invested capital is that for which payment has been made *bona fide,* "specifically as such," or good will *bona fide* purchased prior to named dates. *Stewart Electric Co.* v. *United States,* 65 C. Cls. 21.
>
> Intangible property *bona fide* was not paid in for stock or shares on the transfer of the assets of the predecessor corporation to the plaintiff, and there can be no inclusion of good will in plaintiff's invested capital. A paid-in surplus may not be allowed in respect of an intangible asset. *Colorado Continental Lumber Co.* v. *United States,* 70 C. Cls. 413; *Daily Pantagraph, Inc.,* v. *United States,* 68 C. Cls. 251.

In *Landesman-Hirschheimer Co.* v. *Commissioner*, 44 F. (2d) 521, the Circuit Court of Appeals for the Sixth Circuit had for consideration substantially the same question here presented. The case was on appeal from the the Board of Tax Appeals (15 B. T. A. 64) which sustained the determination of the Commissioner on this point on the ground that the taxpayer had failed to prove the acquisition of good will at the time the business was taken over. The taxpayer appealed from the ruling of the Board and again urged its contention before the Circuit Court of Appeals. In rejecting the position of the taxpayer the court said (pp. 522–523):

> The chief insistence on the part of the petitioner is that the Commissioner and Board erred in refusing to include an item of at least $81,250 as good will, in arriving at the amount of invested capital. No item of good will was included upon the asset side of the petitioner's financial statement from the time of its organization in 1896 to the present time. The business was founded in the year 1875 and was carried on as a sole proprietorship until 1880, when Landesman, the founder, took a partner. It was conducted as a partnership from 1880 to January 2, 1897, when a book value of $273,346.21 of assets of the partnership was turned over to the petitioner in return for $249,000 par value of capital stock. The corporation set up a reserve for discounts on accounts re-

ceivable of $7,439.08, which item may or may not fall within the principles above discussed, and the remaining excess of assets over liabilities was treated as a paid-in surplus of $15,907.13. As already stated, the assets contain no item of good will, although undoubtedly the good will of the business passed to the corporation and was of substantial value. The sole question is whether, more than twenty years later, this item may be inserted nunc pro tunc, to increase the valuation of assets adopted by the parties, with a corresponding increase in paid-in surplus, simply because it must be conceded that the good will, whatever it was, passed to the corporation, and that it was a thing of value.

* * * * *

It may be conceded that the good will of the partnership at the time of incorporation was intangible property which was paid in as part consideration for the shares issued for the aggregate of tangible and intangible property, but, even conceding this fact, we are met by the condition (b) limiting the sum, which is permitted to be included in invested capital, to the par value of stock or shares "issued therefor." With reference to tangible property the act provides that the included value shall "in no case exceed the par value of original stock or shares specifically issued therefor." We see no distinction of expressed intent between the language there used and that used with ref-

erence to intangible property. On the contrary, we are of the opinion that, in order to warrant the inclusion of good will, a valuation must have been placed upon it as of the time it was acquired, and such valuation must have consciously formed the consideration for, and operated to discharge the subscriber's liability arising out of, the issue of a specific amount of capital stock. It is authoritatively determined that "invested capital" is to be determined upon actual "cost" to the individuals organizing and conducting an enterprise, plus surplus accumulated in such business from earnings (not write-ups), and retained for its conduct. *La Belle Iron Works* v. *U. S.*, 256 U. S. 377, 388, 41 S. Ct. 528, 65 L. Ed. 998. The idea carries with it that of the conversion of wealth from one form to another by that which is in effect a sale of property to be paid for in stock, and the act limits the values to be included in invested capital, not only to the actual cash value of the property so sold or transferred, whether tangible or intangible, but likewise to the par value of the stock or shares which formed the consideration for the purchase. That which is given to the corporation without this consideration of stock issued, or without the specified quid pro quo, is not to be considered as augmenting the original invested capital. Thus under the congressional definition, borrowed money, or property obtained by bond issues, is not to be included. Cf. *Baker &*

Taylor Co. v. *U. S.*, 26 F. (2d) 187 (C. C. A. 2).

> Nor can a valuation of good will as of that time be now included in invested capital as part of the surplus then paid in but inadvertently omitted from the statement. Surplus is but a balance figure, and would be increased by any addition to the assets; but the effect of the statutory definition of "invested capital" is, we think, to definitely limit and restrict the extent to which good will or other intangible assets may be used to so increase the paid-in surplus. The provision of the act covering paid-in surplus being general, and the restrictions upon the inclusion of intangible property in invested capital being specific, the limitations provided with reference to such intangible property must apply, and prevent that which can not be considered part of invested capital as intangible property from being so considered as part of paid-in surplus.

The decision of the Circuit Court of Appeals for the Seventh Circuit in *Strong Publishing Co.* v. *Commissioner*, 56 F. (2d) 550, *supra*, is at variance with the decisions of the Court of Claims and the Circuit Court of Appeals for the Sixth Circuit, shown above. In that case the Board of Tax Appeals rejected the contention of the taxpayer that good will, circulation structure, and an Associated Press membership acquired gratuitously was includable in invested capital as paid-in surplus, and while the Circuit Court of Appeals sustained this

ruling it did permit the inclusion of these intangibles, as restricted by the statute, under sub-section (4) of Section 326 (a) of the Revenue Act of 1918 (*infra*, p. 22). The determination of the court on this point is not supported by any reasoning set out in its opinion, and it is submitted that the conclusions reached by the Circuit Court of Appeals for the Sixth Circuit in the *Landesman-Hirschheimer case, supra,* by the Court of Claims in the *Crossett case, supra,* and by the Circuit Court of Appeals for the Second Circuit in the present case, that intangible property may not be included in invested capital unless paid for specifically by stock or shares, are supported by sound and logical reasoning and properly reflect the intention of Congress on this point.

In view of the stringent limitations placed by Congress upon the items which are properly includable in invested capital we believe the respondent's contention can not prevail.

III

THE CLAIM FOR REFUND FILED BY THE RESPONDENT ON MARCH 25, 1924, DID NOT SET FORTH AS A GROUND THAT IT WAS ENTITLED TO INCLUDE IN ITS INVESTED CAPITAL THE INTANGIBLE PROPERTY RECEIVED AT THE TIME IT WAS ORGANIZED

The contentions of the petitioner on the issue on which the writ of certiorari was issued are applicable also to this point. (Petitioner's Brief, pp. 5–13.) The claim for refund filed March 25, 1924,

did not specify as a ground that the respondent was entitled to include in its invested capital the value of the intangible assets received on the date of its organization. As this point has been fully presented in petitioner's prior brief, it is not set forth again in this brief.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

Sections 326 and 327 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1092, 1093, provide as follows:

> SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):
>
> (1) Actual cash bona fide paid in for stock or shares;
>
> (2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount in-

cluded under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided,* That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of

inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328;

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evi-

denced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY No. 234

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1932

THE UNITED STATES OF AMERICA,
Petitioner,

against

HENRY PRENTISS & COMPANY, Inc.

AFFIDAVIT ON BEHALF OF PRENTISS & CO. SUBMITTED IN CONNECTION WITH BRIEF IN OPPOSITION TO PETITION OF UNITED STATES FOR WRIT OF CERTIORARI.

IN THE

Supreme Court of the United States

October Term, 1932

No. 234

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

HENRY PRENTISS & COMPANY, INC.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOSEPH F. MURRAY, being duly sworn, deposes and says:

I am counsel for Henry Prentiss & Company, and was such counsel upon the trial of this action and upon the appeal to the Circuit Court of Appeals.

After the determination of this case by the Circuit Court of Appeals Mr. Leon E. Spencer, the Assistant District Attorney who had tried this case and had handled the appeal to the Circuit Court of Appeals on behalf of the government, requested that we stipulate that issuance of the mandate be stayed for ninety days so as to give the government an opportunity to decide whether it wished to apply for a writ of certiorari. I told Mr. Spencer that if the government decided to apply for a writ of certiorari naturally we would desire to apply for a writ on behalf of Prentiss & Company. I stated that if the government did decide to apply for a writ I wished to be advised of that determina-

tion in advance of the expiration of the time for the filing of a petition so that I might arrange to file a petition on behalf of Prentiss & Company. The reason for the request was that each of the parties had been appellant in the Circuit Court of Appeals and that court had reversed the lower court in every respect. Prentiss & Co. was willing to have the matter rest where it was after the determination of the Circuit Court of Appeals, but in the event the case did go to the Supreme Court we did not wish to be precluded from advancing the errors which we claim the Circuit Court of Appeals committed as to Prentiss & Company.

Mr. Spencer told me that I would be so advised in the event that we signed the stipulation before mentioned. With that understanding, we did sign a stipulation staying the issuance of the mandate for ninety days and further staying the issuance until the disposition of a petition for a writ of certiorari if such a Petition should be filed. An order was entered upon that stipulation, copy of the stipulation and order being herewith attached and marked A.

The last day upon which a petition for a writ of certiorari could have been filed was July 18th, and I am informed that on that last day a petition for a writ of certiorari was filed on behalf of the government without having given to me or to the attorneys of record for Prentiss & Company advice that such a petition was to be filed.

By failure upon the part of the government to comply with the oral understanding which was had between the attorney for the government and myself, Prentiss & Company lost its right to apply for a writ of certiorari on its behalf. That it is a serious matter may be readily seen from the statement which I shall now present regarding the issues involved in this action.

The action was instituted to recover income and excess profits taxes claimed to have been illegally assessed for the

years 1918 and 1920. The taxes for these years were assessed under the Revenue Act of 1918. The plaintiff claimed that under the provisions of Section 326 of that Act it was entitled for each of the years in question to an invested capital in excess of the amount allowed by the Commissioner of Internal Revenue. Two items of property were involved in the claim; first, real estate and secondly, intangibles such as good will, contracts, etc.

There was and is no dispute between the parties as to the valuation of the properties in question and the case turned solely upon the construction of the provisions of the Revenue Act.

As to the real estate, the government admitted that under the provisions of the Revenue Act of 1918 plaintiff was entitled to additional invested capital but as to the year 1918 plaintiff was not entitled to recover for the overpayment because the refund claim was not sufficient in form to warrant a recovery. As to the year 1920, the government admitted that the plaintiff was entitled to additional invested capital for real estate.

As to intangibles, the government, admitting the existence and value of the intangibles, claimed that under the law and the facts plaintiff was not entitled to have intangibles included as part of invested capital and further contended that even if plaintiff was entitled to such inclusion under the 1918 Act it could not secure refund for the year 1918 on account of the insufficiency of the refund claim for such year.

After a trial before Judge CAFFEY, the latter held that under the Revenue Act of 1918 the intangibles should have been included as part of invested capital but because of the insufficiency of the refund claim for 1918 the plaintiff was not entitled to recover for either the intangibles or the

real estate. As to the year 1920, Judge CAFFEY decided that the plaintiff was entitled to increased invested capital for both the intangibles and the real estate.

Both parties appealed to the Circuit Court of Appeals, the plaintiff claiming that the refund claim for 1918 was sufficient and that it was entitled to increased invested capital for that year by reason thereof, the defendant claiming that Judge CAFFEY erred in allowing increased invested capital for the year 1920 for intangibles upon the ground that Section 326 of the Revenue Act of 1918 did not permit the inclusion of intangibles in invested capital under the facts disclosed.

The Circuit Court of Appeals reversed Judge CAFFEY in every respect except as to the inclusion of the real estate in invested capital for the year 1920. That Court held that the refund claim for 1918 was sufficient but that Section 326 of the Revenue Act of 1918 did not permit the inclusion of intangibles in invested capital under the facts disclosed. It, therefore, allowed the inclusion of real estate in invested capital for the year 1918 which Judge CAFFEY had disallowed. As to the year 1920, the Circuit Court of Appeals reversed Judge CAFFEY's ruling as to intangibles and held that under Section 326 of the Revenue Act of 1918 intangibles could not be included in invested capital for that year under the facts disclosed.

The result was that two courts had arrived at diametrically opposite views on the contested issues. In whatever respect the plaintiff prevailed before Judge CAFFEY it lost in the Circuit Court of Appeals, and in whatever respect the defendant prevailed before Judge CAFFEY it in turn lost before the Circuit of Appeals.

We claim that the Circuit Court of Appeals was in error in holding that under the facts intangibles should not

be included in invested capital for either of the years 1918 or 1920. The facts which we claim entitled the plaintiff to increased invested capital because of intangibles are as follows:

Plaintiff was organized in August, 1916, with a capital of $10,000 (R., 18). The purpose of the organization was to take over the business, property and assets of Prentiss Tool & Supply Company, a corporation organized in 1878, and which had during the intervening years been carrying on the business of buying and selling machine tools (R., 18, 19, 45-49). On August 17, 1916, plaintiff acquired from Prentiss Tool & Supply Company 100 shares of Atchison, Topeka & Santa Fe stock, at that time owned by the latter company, and issued in payment therefor all of its own capital stock (R., 18, 45, 46). The stock so acquired had an actual value of $10,000, was carried on the books of Prentiss Tool & Supply Company in the sum of $10,000 and was entered on the books of plaintiff at the same sum (R., 18).

Immediately thereafter the capital stock of plaintiff was increased to $500,000 (R., 54). Thereupon arrangements were made between plaintiff and Prentiss Tool & Supply Company whereby the latter was to sell to plaintiff and plaintiff was to acquire all of the "business, property and assets, real and personal, of Prentiss Tool & Supply Company, *including name, good will, contracts and rights of every character and description*", subject, however, to the debts and obligations of that company (R., 46-49).

The arrangement provided that plaintiff was to issue 4900 shares of its capital stock of the par value of $490,000 in payment for the property so to be acquired (R., 46).

The arrangement for such sale and acquisition is set forth in and authorized by resolutions adopted at meetings of stockholders and directors of both companies held

August 17, 1916, and August 26, 1916. Copies of the resolutions are annexed to the stipulation of facts entered into between the parties herein (R., 45-52) and were also attached to the brief filed with the Commissioner of Internal Revenue dated April 8, 1926, being Exhibit No. 12, not printed in accordance with stipulation and order omitting exhibits (R., 122).

The sale was effected, the properties were acquired by plaintiff, the stock was issued therefor, and the transaction was in all respects performed and carried out as set forth in the resolutions above referred to.

The property so acquired by plaintiff for $490,000 par value of its stock consisted of cash, accounts receivable, securities, inventories, fixed assets and intangibles.

There was no entry on the books of the Prentiss Tool & Supply Company covering intangibles or the value thereof. It is stipulated, however, that the Prentiss Tool & Supply Company owned intangible properties which were included in the transfer and that plaintiff acquired such intangibles and that the value thereof was at least $300,000 (R., 43).

Plaintiff in opening its books entered the property and assets acquired at the same value and in the same manner as theretofore carried on the books of Prentiss Tool & Supply Company, and the opening balance sheet of plaintiff was the same as the closing balance sheet of Prentiss Tool & Supply Company, except for necessary changes in surplus and capital, the normal incident of the higher capital of plaintiff. Plaintiff did not make any entry or show on its books any item for intangibles or the values existing therein.

Section 326 (a) of the Revenue Act of 1918 (40 Stat. 1092) provides:

> "(a) That as used in this title the term 'invested capital' for any year means * * *:

> (4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest; * * *"

Section 325 (a) of the Act provides that good will, franchises and other like property are included within the term intangible property.

The Circuit Court of Appeals based its decision against the plaintiff upon the ground that there should have been a specific issue of stock for intangibles, that Court saying (*Prentiss* v. *United States*, 57 F. (2d) 676, 678):

> "It is apparent that to include good will as invested capital the stock of the company must be specifically issued for the intangibles. It is not enough to issue it for the property generally which was taken over."

This holding is directly contrary to the ruling which the Board of Tax Appeals has consistently applied beginning with the case of *St. Louis Screw Company*, 2 B. T. A. 649.

See *Appeal of Mandel Bros.*, 4 B. T. A. 341;
Tyler & Hippach, Inc., 6 B. T. A. 636;
Penn. Cent. Brewing Co., 9 B. T. A. 264;
D. N. & E. Walter & Co., Inc., 10 B. T. A. 620.

The Commissioner of Internal Revenue specifically acquiesced in the decision of the Board of Tax Appeals in the *St. Louis Screw Company* case on page 28 of Cumulative Bulletin VII-1 containing rulings for January to June, 1928.

In *Lafayette-Southside Bank* v. *Commissioner*, 33 F. (2d) 646, 648, the Board of Tax Appeals had refused to include good will in invested capital on the amalgamation of two banks. The Court of Appeals of the District of Columbia affirmed that decision because of the fact that the parties expressly stipulated in their contract that no value should be placed upon the good will of the old banks and no stock was actually issued therefor. We believe that had there been in that case, as here, a provision that stock should be issued for a mixed aggregate of tangibles and intangibles, the Board of Tax Appeals and the Court of Appeals of the District of Columbia would have followed the ruling in the *St. Louis Screw Company* case.

In this case Judge CAFFEY specifically found as facts that the plaintiff purchased a mixed aggregate of tangibles and intangibles and that that property was bona fide paid in to plaintiff for stock of the plaintiff; and that a certain proportion of the shares of the stock was issued for the intangible properties (R., 73, 74).

The ruling of the Circuit Court of Appeals nullifies Section 326, subdivision (4), in every case where the value of the tangible property is in excess of the par value of the stock issued. If there had been an intention on the part of Congress to exclude such a case from the operation of the law, it would in our opinion have used more apt language to carry out its intent.

We have been unable to find any case which disagrees with the determination in the *St. Louis Screw Company* case except the determination in the instant case in the Circuit Court of Appeals.

The cases relied upon by the Circuit Court of Appeals in this case are entirely unlike the instant case.

The case of *LaBelle Iron Works* v. *U. S.*, 256 U. S. 377, deals with the question of the right to capitalize an increase in the value of property as earned surplus. It does not deal with a case where there has been the acquisition by purchase of property for shares in a corporation, and, therefore, Section 326 (a) is not applicable.

In *Crossett* v. *U. S.*, 50 F. (2d) 292, the Court of Claims specifically stated in its opinion:

> "It was agreed that of said property acquired, sufficient was to be taken at book value to pay at par for said stock, and the balance was to constitute a surplus at the organization of the corporation."

In other words, the *Crossett* case is exactly similar to the case of *Lafayette-Southside Bank* v. *Commissioner* (*supra*) because it was specifically agreed that the stock was paid for with the tangibles and not with intangibles.

In *Landesman* v. *Commissioner*, 44 F. (2d) 521, there was a definite finding that all the stock was issued for tangibles and no stock was issued for intangibles. The Court did state that no doubt good will existed and was acquired by the corporation and was in that sense probably an element affecting consideration paid for the property acquired. It was pointed out, however, that no stock was issued for the intangibles. In the present case there is an express finding amply supported by the evidence that stock was issued for intangibles. From the records of the *Landesman* case as it appears in 15 B. T. A. 64-66, it appears that the resolutions under which the stock was issued provided that all of the stock should be issued for specific tangible properties. In the instant case the resolution was that the stock should be issued for tangibles and intangibles and there is a finding of fact that stock was issued for good will. The Board of Tax Appeals in the

Landesman case neither enlarged upon nor overruled its prior decision in the *St. Louis Screw Company* case which has been consistently followed by the Board of Tax Appeals. The Board of Tax Appeals in the *Landesman* case disposed of the case upon the ground that the existence of good will had not been established.

Sufficient has been said to indicate that if the Circuit Court of Appeals was not absolutely wrong in its determination of the question of the inclusion of intangibles in invested capital, at any rate there is a very debatable question involved which the plaintiff would not intentionally waive if the case were to be submitted to this Court.

Under the judgment of the Circuit Court of Appeals the plaintiff here would have recovered practically the same amount as it would have recovered under the judgment based upon Judge CAFFEY's decision, and for that reason the plaintiff did not intend to seek a review of the ruling of the Circuit Court of Appeals unless the government sought a review.

If the government had given me as little as two days notice of its intention to apply for a writ I could have sought and no doubt obtained from a justice of this court a short extension of time within which to apply on behalf of Prentiss & Company.

If there had not been the oral understanding between myself and the attorney representing the government that I would be advised of the determination of the government to apply for a writ, I would have been diligent to see that the statutory period had not run against me.

JOSEPH F. MURRAY.

Sworn to before me this
26th day of August, 1932.

MABEL E. PALMER
Commissioner of Deeds, New York City.

A.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

HENRY PRENTISS & COMPANY, INC.,
Plaintiff-Appellant and Appellee,

against

THE UNITED STATES OF AMERICA,
Defendant-Appellant and Appellee.

Upon the within consent of Jeffery & Redmond, Esqs., attorneys for the plaintiff-appellant herein, and upon all the proceedings heretofore had, it is, on motion of George Z. Medalie, United States Attorney for the Southern District of New York, attorney for defendant-appellant,

ORDERED that the issuance of the mandate in the above entitled case be and the same hereby is stayed for a period of ninety days from the date of this order, and it is

FURTHER ORDERED that if a petition for a writ of certiorari be filed in the Supreme Court of the United States within said period, the issuance of the mandate of this Court herein be stayed until the disposition of said petition.

Dated: New York, N. Y., April 25, 1932.

MANTON,
U. S. C. J.

Above order consented to:

JEFFERY & REDMOND,
Attorneys for Plaintiff-Appellant.

FILE COPY

No. 234

FILED
AUG 27 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1932

THE UNITED STATES OF AMERICA,
Petitioner,

against

HENRY PRENTISS & COMPANY, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFERY & REDMOND,
Attorneys for Respondent.

JOSEPH F. MURRAY,
J. ARTHUR MATTSON,
Of Counsel.

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HENRY PRENTISS & COMPANY, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Respondent is submitting in connection with this brief the affidavit of Joseph F. Murray, its counsel, to show that respondent has lost the right on its part to apply for a writ, because of the failure of the Government to comply with an oral understanding between him and the attorney for petitioner.

Facts.

Respondent filed its income and excess profits tax return for the year 1918 on June 16, 1919, and paid the tax shown to be due. On March 25, 1924, it filed its claim for refund (Plaintiff's Ex. 3, R., 97). The claim stated:

> "Taxpayer's application for special assessment was denied, despite the fact that an abnormal condi-

tion existed in both its income and invested capital.
* * *

"*In order to protect its right to secure a refund of taxes paid in excess of the tax legally due for 1918*, this claim for refund is filed upon the ground that it is entitled to relief under Sections 327-8 of the 1918 Act.

"When this claim comes up for consideration, this corporation claims the right to a hearing and to submit further evidence in connection with special assessment."

The application for special assessment mentioned in the refund claim was an application made by respondent at the time it filed its tax return for 1918, and was attached to the 1918 tax return.

Page six of the return showed that the petitioner was incorporated on September 1, 1916, and the return contained the following question and answer:

"8. Did the corporation ever take over a going business or otherwise acquire a mixed aggregate of tangible property, patents and copyrights, and good will and other similar intangible property in whole or in part with stock or other securities? Yes."

Even at the time the return was filed it appeared, therefore, that the respondent had acquired a mixed aggregate of tangible and intangible property for stock issued by it.

After the filing of the refund claim and during the years 1925 and 1926 the Treasury Department granted refunds respecting the 1918 taxes, these refunds involving many adjustments affecting both income and invested capital (Plaintiff's Exs. 16, 17, 18).

By letter dated July 16, 1925, the Commissioner informed the respondent that "your claim will be rejected" (Plaintiff's Ex. 9, R., 102, 103).

On February 23, 1926, however, the Solicitor of Internal Revenue, on the stationery of the Commissioner of Internal Revenue, wrote respondent as follows:

> "You are advised that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919, your application for special assessment. Some question has arisen as to the denial of special assessment. However, before a final decision is reached you will be granted an opportunity to be heard orally if you so desire" (R., 104).

Respondent expressed a wish for an oral hearing and March 15, 1926, was fixed as the day therefor (R., 105).

After that hearing the plaintiff executed and filed application for refund and relief dated April 8, 1926 (Plaintiff's Ex. 12). On the first page of that exhibit appears the following:

> "* * * This affidavit is submitted, together with detailed schedules attached, in support of the claims and statements discussed at said hearing."

That application contained all the facts and data upon which the present action is based, and it closed as follows:

> "It is respectfully requested that taxpayer's invested capital be adjusted and such profits tax determined as is proper and authorized by law."

Respondent upon the trial offered evidence as to what transpired at the hearings in Washington for the purpose

of showing that the very questions presented in this action were discussed and considered at the hearings in Washington. This offer of proof was rejected and exception was taken (R., 36, 37, 38).

The claim for refund was finally rejected on the rejection schedule signed by the Commissioner on September 3, 1926 (R., 85).

This action was instituted by a petition which claimed that the Commissioner of Internal Revenue erred in not increasing respondent's invested capital by including therein a certain amount for real property and an amount for intangible property acquired for stock bona fide issued. The petition alleged:

> "8. That petitioner duly filed claims for refund of overpayments of income and excess profits taxes as aforesaid, pursuant to the statutes of the United States made and provided, and pursuant to regulations of the Secretary of the Treasury prescribed pursuant to said statutes, upon the ground that said taxes had been illegally and wrongfully assessed and collected" (R., 5, 6).

Petitioner's answer, paragraph Second, specifically admitted the allegations above quoted (R., 113). That answer was filed over one year after the filing of the petition, the Government having obtained continuous extensions of time to answer. The pleadings remained as thus drawn from October, 1928, the date of the answer, to February, 1930. The case had arrived on the day calendar of the District Court on January 8, 1930, and remained thereon for approximately one month, being marked ready daily (R., 138).

It was only after that period that the Government conceived the idea that the refund claim for 1918 was insufficient, and it then made a motion to amend its answer to deny the sufficiency of the refund claim, and the affidavit in support of the motion gave as the basis for an order amending the answer that "unless such amended answer is permitted, the plaintiff undoubtedly will succeed in establishing relief which was not claimed in the claims for refund" (R., 127).

The respondent opposed the application on the ground that the Government showed no equitable grounds why it should be permitted to amend its answer at that stage of the proceedings after defending for a period of over two years on the merits. The motion was granted, however, and an amended answer served in which it denied part of the allegations of paragraph Eighth of the petition.

However, that very amended answer admits that the Commissioner of Internal Revenue refused to include in the invested capital of the respondent the sums set forth in the petition for real estate and intangibles (R., 12).

There could be no refusal without a request, and therefore on the Government's own pleading it stands admitted that respondent requested the Commissioner to include the two items in question in its invested capital and he refused to do so. Therefore, the Commissioner was not deprived of any knowledge or in any way misled, and he was not denied the privilege of passing upon the merits of plaintiff's tax liability under the return filed and the refund claim.

POINT I.

Prior to the formal rejection of respondent's claim for refund the Commissioner was advised of the claims set up in this action, consideration was given to them and they were rejected.

The original claim for refund for the year 1918 sought an adjustment of respondent's invested capital under Sections 327-8 of the Revenue Act of 1918 known as the Special Assessment provisions. The suit as instituted sought an adjustment of respondent's invested capital under Section 326 of the Revenue Act of 1918 by including therein certain items for real property and intangibles acquired by purchase for stock of the respondent. The adjustment of invested capital is what was sought by respondent from the beginning.

We claim that sufficient facts were continually before the Commissioner from the time of the filing of the 1918 return to put him on notice that the invested capital should be increased under Section 326. As above stated, however, no increase was asked under Section 326 by the refund claim as originally filed.

However, before the formal rejection of the 1918 refund claim, the Commissioner was specifically advised of the claim that the invested capital should be increased under Section 326 by the inclusion therein of the items for real estate and intangible property. We endeavored to prove upon the trial that at oral hearings at Washington the claim was advanced. We claim the Court erred in refusing to admit that evidence. However that may be, the same result may be accomplished by reason of the fact that the defendant's amended answer specifically admits that the Com-

missioner *refused* to include in invested capital the items claimed by the suit. Naturally, a refusal presupposes a claim or demand, and a consideration of that claim or demand. We do not understand that the Government controverts the fact that these claims were considered and rejected. The Government's brief, page five, impliedly concedes that these claims were considered and rejected.

If a claim for refund has been duly filed, the failure to insert therein a particular ground for relief is not a jurisdictional defect which would prevent the Commissioner from considering that ground. Jurisdiction having been granted to the Commissioner by the filing of the claim within time, he is not limited in the exercise of his jurisdiction to a consideration of the matters set out in the refund claim. This is evident from this Court's decision in *Tucker* v. *Alexander,* 275 U. S. 228, and *United States* v. *Felt & Tarrant,* 283 U. S. 269.

In the *Tucker* case, it was held that the Commissioner could waive compliance with the provisions regarding the form of the refund claim. In that case the taxpayer was permitted to recover because the Government upon the trial had not objected to the consideration of a question which was never presented by the refund claim and therefore never passed upon by the Commissioner.

In the *Felt & Tarrant* case, the claim advanced in the action was nowhere mentioned in the claim for refund or in the brief filed with the Commissioner or at the hearings before the Commissioner. The Court specifically mentioned this fact and proceeded to state:

> "One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to assure an orderly administration of the revenue * * *."

And on the question of waiver, the Court said:

> "Here there was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it."

In the instant case, however, the evidence shows and the Government concedes that the claims advanced in this action were advanced before the Commissioner and considered by him. Not only that, but after the institution of this action and for a period of over two years and up to the eve of trial, the Government made no question about the sufficiency of the refund claim to permit the raising of the questions raised by the petition. If, therefore, the Commissioner may waive strict compliance with the provisions regarding the form of a claim for refund, he has done so here.

As we see it, it is not a valid objection that the Commissioner was advised of and considered the claim after the statutory period for filing a claim for refund had expired. The claim had not been formally rejected and jurisdiction still rested in the Commissioner to consider the claim for refund for the year in question. That is the theory upon which the Circuit Court of Appeals proceeded, and we believe it to be a correct one.

POINT II.

The cases cited by the Government are not in conflict with the decision of the Circuit Court of Appeals.

The petition is based on an alleged conflict of decisions between the Circuit Court of Appeals in this case and the decisions in five cases therein mentioned which we shall consider in order.

In *Jonesboro Grocer Co.* v. *United States,* 66 Ct. Cls. 320, the taxpayer in March, 1918, filed its 1917 return, paying the tax shown to be due thereon. In July, 1919, the taxpayer filed an amended return for 1917 and a claim for refund of some $400 based on the amended return. The claim for refund was rejected but the Commissioner determined that the taxpayer had in other respects overpaid its 1917 tax and allowed an over-assessment of over $1,300, which the taxpayer accepted as a credit against its 1918 tax. At this stage it appeared that both the taxpayer and the Commissioner considered the matter closed. In 1924 and after the expiration of the statutory period for filing a claim for refund for the year 1917, the taxpayer filed a new and second claim for a refund of part of its 1917 tax which was in no way related to the first claim for refund and was not stated to be amendatory thereof. The Commissioner failed to note that the second claim was filed too late, considered and granted the claim, and notified the taxpayer that a certificate of over-assessment would be issued. Later the Commissioner discovered that the claim had been filed too late and rejected it.

In that case the claim originally filed had been fully and finally disposed of, and therefore there was no claim in existence which would jurisdictionally be the subject of

amendment or the subject of consideration by the Commissioner.

In the case of *Wassau Sulphate Fibre Co.* v. *United States,* 49 F. (2d) 665, the taxpayer never filed a claim within the statutory period. What it claimed to be a claim for refund was simply a letter to the Revenue Agent at Milwaukee requesting that its excess profits taxes be computed under certain sections of the statute, but contained no hint even that it was considered a claim for refund. After the statutory time for filing a claim had expired, the taxpayer filed a formal claim allegedly amendatory of what it called its formal claim for refund, viz., the letter to the Revenue Agent at Milwaukee. The Commissioner refused to accept the formal claim because it was filed too late and because it could not be considered an amendment of an original claim, because there was no original claim. The court sustained the Commissioner, holding that what was obviously not a claim could not be made one by amendment after the statutory time for filing claims had expired.

In the instant case there was a formal claim filed within the statutory period.

In *Swift & Co.* v. *United States,* 68 Ct. Cls. 97, 105, the only question was whether the time to file a claim ran from the certificate of the Commissioner to the Collector of an over-assessment or the signing of the schedule by the Commissioner. The court ruled that a credit was not allowed until the Commissioner signed the schedule, and that hence a claim for refund figured from that time was filed in time. This court specifically refused to pass upon the question of whether a second claim in that case was a mere amendment of the first, affirming the lower court's determination that the second claim was in time.

In *Feather River Lumber Co.* v. *United States,* 66 Ct. Cls. 54, the taxpayer filed a so-called claim for refund of a

portion of the tax paid for the year 1918. The Commissioner did not object to the sufficiency of the claim and allowed a refund thereon. In May, 1925, the taxpayer wrote a letter to the Commissioner calling attention to the fact that the Commissioner in auditing the 1918 return had failed to deduct a certain loss. The court held that suit could not be maintained on the matter set forth in the letter of May, 1925, for the reason that it did not in any sense constitute a claim for refund. The court pointed out that the requirement that the claim for refund must be filed was to give the Commissioner a chance to review his actions and to correct his errors, and that he could not do this if the taxpayer failed to advise him of the ground relied upon for recovery. Obviously, that condition did not exist in the case at bar.

In *Mutual Life Ins. Co.* v. *United States,* 49 F. (2d) 662, on August 2, 1927, the taxpayer filed a claim for refund of part of the tax paid for the year 1922. "This claim for refund was considered and wholly disallowed and rejected by the Commissioner of Internal Revenue on September 3, 1927." In December, 1928, after the time for filing claim for refund had expired, taxpayer mailed to the Commissioner a statement seeking a refund of nearly $600,000 of 1922 taxes. The court properly sustained the Commissioner in his contention that if he had rejected the first claim and the time for filing a new one had expired, it was too late to file a claim which could be made the basis of a suit.

It will be seen from a review of these cases that there is not one which lays down a rule contrary to that laid down in this case in the court below.

None of the other cases cited by the Government in its brief is contrary to the position taken by the respondent, but most of them rather support its contention.

Conclusion.

The petition should be denied.

Respectfully submitted,

JEFFERY & REDMOND,
Attorneys for Respondent.

JOSEPH F. MURRAY,
J. ARTHUR MATTSON,
Of Counsel.

FILE COPY

NO. 234

Office Supreme Court, U. S.
FILED
DEC 8 1932
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1932

THE UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY PRENTISS & COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1932

THE UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY PRENTISS & COMPANY, INC.,
Respondent.

Opinions Below.

The opinion of the District Court (R. 25-27) is reported in 46 F. (2d) 159. The opinion of the Circuit Court of Appeals (R. 76-79) is reported in 57 F. (2d) 676.

Question Presented by Petitioner.

The sole issue raised by the petitioner is whether respondent is barred from recovering an overpayment of tax for the year 1918, which it is otherwise concededly entitled to recover, because of the statutory requirement that claim for refund must be "duly filed" with the Commissioner before suit for recovery of the tax involved may be begun.

Claim for refund of taxes for 1918 was filed in time, but the District Court held that suit was brought on "facts" other than those presented to the Commissioner of Internal Revenue. The Circuit Court of Appeals reversed,

holding that the contentions advanced in the suit were set out in an "additional brief" (accepted and considered by the Commissioner before the claim was rejected) which, although submitted after the time for filing claims had expired, was merely an amendment of the seasonably filed claim and, therefore, that the statutory requirement had been complied with.

Respondent has consistently adhered to the position that suit was brought on data set forth both in the original claim for refund and the so-called amendment.

Question Presented by Respondent.

The respondent presents and asks the Court to consider the question whether under the evidence the respondent was entitled to increased invested capital for the years 1918 and 1920 under Section 326 of the Revenue Act of 1918—C. 18, 40 Stat. 1057, 1091, 1092, 1093—because of the acquisition by respondent of intangible property included in a mixed aggregate of tangible and intangible property acquired by respondent for its stock.

Respondent's question arises in this manner. Action was instituted to recover over-payments of taxes for the years 1918 and 1920, because of the failure of the Commissioner to include in its invested capital for those years two items of property: (a) actual value of real estate; (b) actual value of intangible property consisting of good will, contracts, etc. The District Court held respondent was entitled to increased invested capital in respect of both kinds of property. Because of an alleged insufficient refund claim for 1918, relief was denied for 1918, but was granted

for 1920. The Circuit Court of Appeals held that respondent was not entitled to increased invested capital in respect of the intangibles, but was so entitled in respect of the real estate. It held the refund claim for 1918 to be sufficient and allowed a recovery in respect of the real estate for both 1918 and 1920. The United States raises no questions as to the propriety of the recovery allowed for 1920.

The United States filed its petition for certiorari on the last day permissible, without previous notice to respondent's attorneys, although they believed they had an understanding that they would be advised of such contemplated action in time to file a cross petition for certiorari.

The reason for respondent's failure to apply for certiorari is set out in the affidavit of Joseph F. Murray, counsel for respondent, dated August 26, 1932, filed with respondent's brief in opposition to the petition for certiorari filed by the United States.

The question presented by respondent has never been considered by this Court or any other tribunal on like facts, except the Circuit Court of Appeals in this case, and the Board of Tax Appeals. The rulings of the latter tribunal support respondent's contention.

In the circumstances respondent feels that it is entitled to present to this Court and have considered by it the issue of whether or not the Circuit Court of Appeals erred in refusing to include intangibles in invested capital for both 1918 and 1920. The rulings of this Court in the following cases amply support its jurisdiction in the premises, and we believe that this is a proper situation for the Court in its discretion to exercise such jurisdiction.

Delk v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588, 589;
Langnes v. *Green*, 282 U. S. 530, 535, 539;
Story Parchment Co. v. *Paterson Parchment Co.*, 282 U. S. 555, 560.

Accordingly, respondent will argue the merits of the question of the inclusion of intangibles in invested capital for 1918 and 1920 under Point IV of this brief. In order not to create confusion, such facts as are material to that question will be separately stated under that point.

Statutes and Regulations Involved.

The pertinent statutes and regulations are set forth in full in the Appendix (pp. 37, etc., *infra*).

Statement of the Case.

Facts as to the Refund Claim for 1918.

Respondent filed its income and excess profits tax for 1918 on June 16, 1919, and paid the tax shown to be due. An application for a special assessment, based on abnormal conditions in its income and *invested capital* was attached to the return. On March 25, 1924, respondent seasonably filed its claim for refund (R. 42½), based on the contention, among others, that:

> "• • • an abnormal condition existed in both its income and *invested capital*"

and stating that *when the claim was considered* the taxpayer would

> "* * * submit further evidence in connection with special assessment."

The claim for refund and request for special assessment arose from the fact that respondent was incorporated in 1916 to take over the business and assets, including a mixed aggregate of *tangible* and *intangible* property, of another corporation. This situation was also reflected in the answer to question 8 in the 1918 return (Plaintiff's Exhibit 1, not printed). In 1925 and 1926, after the filing of the claim for refund, several partial refunds based on adjustments of income and *invested capital* as shown in the 1918 return, were granted (Plaintiff's Exhibits 16, 17, 18, not printed).

By letter dated July 16, 1925, the Commissioner informed respondent that "your claim *will be* rejected" (R. 46). On February 23, 1926, the Commissioner through the Solicitor of Internal Revenue, wrote respondent as follows:

> "You are advised that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919, your application for special assessment. Some question has arisen as to the denial of special assessment. However, *before a final decision is reached* you will be granted an opportunity to be heard orally if you so desire" (R. 46, 47).

An oral hearing was had March 15, 1926. After that hearing, respondent executed and filed an affidavit with schedules attached dated April 8, 1926, which the Circuit Court of Appeals called an amendment of the previously filed claim for refund (Plaintiff's Exhibit 12, not printed). This document began with the statement that it was submitted:

> "* * * in support of the claims and statements discussed at said hearing",

specifically set forth the facts and data upon which this suit is based, and concluded with the request that:

> "* * * taxpayers *invested capital* be adjusted."

Although Plaintiff's Exhibit 12 is not printed, a digest of it is contained in refund claim for 1920 (Plaintiff's Exhibit 13) and is used as a basis for relief for 1920 (R. 47-49).

At the trial in the District Court respondent offered evidence as to what transpired at the hearings in Washington for the purpose of showing that the same questions presented in this action were discussed and considered at the hearings before the Commissioner. This offer of proof was rejected by the District Court and exception taken (R. 18).

The claim for refund was rejected September 3, 1926, by the signing of the rejection schedule by the Commissioner.

Suit was begun by respondent in September, 1927, by petition which alleged that the Commissioner erred in not increasing respondent's *invested capital* by including therein certain values for *tangible* and *intangible* property. The petition also alleged, among other things, that claim for refund of the tax sought to be recovered had been duly filed. The answer admitted these allegations (R. 50). Approximately two and a half years later, when the case was about to be reached for trial, petitioner was permitted to amend its answer to set up the alleged technical insufficiency of the refund claim. In the application to amend, petitioner stated that unless it was allowed to so amend its answer:

> "* * * plaintiff undoubtedly will succeed in establishing relief" (R. 60).

SUMMARY OF ARGUMENT.

I. The claim for refund, duly filed March 25, 1924, is sufficient to support the maintenance of this suit.

II. The "brief" filed with the Commissioner April 12, 1926, was a permissible amendment of a "duly filed" claim for refund sufficient to support the maintenance of this suit.

III. Petitioner has failed to show either by reason or by authority that the decision of the Circuit Court of Appeals should be reversed.

IV. The Circuit Court of Appeals erred in refusing to include in respondent's invested capital for 1918 and 1920 the actual value of intangible property acquired in 1916.

ARGUMENT.

POINT I.

The claim for refund, duly filed March 25, 1924, is sufficient to support the maintenance of this suit.

Petitioner concedes that the refund claim filed March 25, 1924, complied with the statute as having been seasonably filed (petitioner's brief, p. 5). It argues, however, that this suit was brought upon grounds for relief which were not brought to the attention of the Commissioner until April 12, 1926, after the time for filing claim had expired and hence that this suit is not brought upon a "duly filed" refund claim as required by the statute. Despite the apparently inadvertent statement in the opinion of the Circuit Court of Appeals to the contrary, respondent has consistently asserted from the beginning of this case, as it now argues, that the original claim for refund sufficiently met the requirements of the statute to allow maintenance of this suit.

The pertinent statute is contained in what is now Section 156, Title 26, U. S. C., which, so far as the portion material to this case is concerned, has remained unchanged since the Revenue Act of 1921. It reads as follows:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected, without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof;"

Respondent's claim for refund was filed March 25, 1924, when the applicable Treasury Regulations 65, Article 1306, read as follows:

> "Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843. All *facts* relied upon in support of the claim *should* be clearly set forth under oath * * *."

This article was carried forward without change in later regulations until 1929. In 1929, the Commissioner made a significant change by Treasury Decision 4265, Cumulative Bulletin, VIII-1, page 110, reading as follows:

> "To all Collectors of Internal Revenue and others concerned:
>
> (1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department

(Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim *must set forth* and in detail *each ground* upon which a refund or credit is claimed, and *facts* sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

* * * * * * * * *

(3) *These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date,* and all other regulations are modified in so far as they are not consistent with these regulations."

The meaning of Article 1306, Regulation 65, *the regulation which governs this case* is clarified considerably by this change. The controlling regulation provides merely that the facts upon which the claim is based "should"—not "must" or "shall" be set forth under oath. But does it require that such facts be set forth *in the claim?* Neither the statute nor the regulation tells us definitely. When are such facts to be submitted? How? Where? Certainly there is no positive direction that the facts *must* be set forth *in the claim itself at the time it is filed.* The very words of the regulation itself show that the word "facts" is not used synonymously with the word "claim". The regulation does not say that all the facts relied upon should be set forth *in the claim* or that the claim *shall contain all the facts relied upon.* The obvious answer is that the facts could be submitted with or in the claim, or later, as the exigencies of the particular case demanded. The essential thing was that any facts not already in the possession of the Commissioner

were required to be furnished to him before the claim had been disposed of finally by allowance or rejection. (*Union & New Haven Trust Co.* v. *Eaton*, 20 F. (2d) 419; *Warner* v. *Walsh*, 24 F. (2d) 449, 450).

This also is the only practical view. (*Lancaster Cotton Mills* v. *United States*, 59 F. (2d) 270, 275). Frequently the Commissioner will pass on a refund claim upon the data set forth in the return itself or upon data which he secures through his own independent examination of the books of the taxpayer. He is not restricted to the data or grounds advanced by the claimant, *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; *Lancaster Cotton Mills* v. *United States, supra.* Often claims for refund are determined upon information conveyed to the Commissioner for the first time at the oral hearing which usually is granted if requested by the taxpayer. There are many other practical reasons why, at least before experience taught differently, the Commissioner thought it would be unwise to frame a positive requirement that *all facts* and *all* theories of relief had to be set forth in the claim itself. It was entirely logical, therefore, for the Commissioner to say in the regulations that the facts should be set forth under oath, but to leave to the necessities of each particular case the question of whether a statement of facts under oath was necessary, and, if so, when it was to be furnished. We recognize that since 1929 the regulation apparently requires that the claim *must* set forth grounds and facts but since this case is not governed by that regulation, we pass the question of its validity. Prior to 1929, however, it is plain that the facts supporting the claim were not required to be set forth in the claim itself unless the courts are going to legislate into the statute and regulation something that was not inserted by their framers. Plainly a seasonably filed claim was a

"duly filed" claim within the meaning of the statute and the regulation whether or not at the time it was filed it set forth all the facts and theories upon which suit was brought later.

In *Union & New Haven Trust Co.* v. *Eaton,* 20 F. (2d) 419, Judge THOMAS said:

> "* * * *Obviously the statute required nothing more than that a claim for refund be duly filed with the Commissioner of Internal Revenue.* In order to induce favorable action, a claimant will assign as many grounds for such refund as he is cognizant of. It is not to be expected that a claimant will conceal a valid ground for a refund merely in order to obtain an opportunity of incurring the expenses of litigation. It is to be observed that, whether claimant assigned grounds or not, *the statute merely requires that he file his claim for refund. To hold, therefore, that a plaintiff is precluded from asserting a reason for a refund that he has not advanced in his notice of claim is to read a condition into the statute not legislated by Congress.*"

Judge THOMAS then refers to *Tucker* v. *Alexander,* 15 F. (2d) 356, afterwards reversed, 275 U. S. 228 and *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626, both being decisions of the Circuit Court of Appeals for the Eighth Circuit. He proceeded as follows:

> "With due deference, therefore, to the judgment of that court, I find myself unable to accept its conclusions, the more so as that court has failed in either case to quote the specific phraseology in the statute upon which it relies."

In the latter case of *Warner* v. *Walsh,* 24 F. (2d) 449, 450, Judge THOMAS said:

> "The second ground is that, in the claim presented to the Commissioner of Internal Revenue for a refund, 'the alleged purchase for value theory' was not set out as a ground for such refund. I regard the claim as untenable."
>
> • • • • • • • •
>
> *"To say that an argument may not be advanced in this court which was not elaborated in the notice of claim before the Commissioner is unwarranted by the language and intent of the statute under consideration."*

Judge BURROWS concurred in the above views in the later case of *Warner* v. *Walsh*, 27 F. (2d) 952.

And in the case of *Wunderle* v. *McCaughn*, 38 F. (2d) 258, Judge KIRKPATRICK stated:

> "I am in accord with the view expressed in *Warner* v. *Walsh* (D. C.) 24 F. (2d) 449, and the opinion of *Union & New Haven Trust Co.* v. *Eaton* (D. C.) 20 F. (2d) 419, that, where the Commissioner is appraised of all the material facts, it is immaterial that the theory on which relief is asked is not set out. *Nor, I think, is it material that the wrong theory is set out.*"

Recovery was allowed by both Courts below because of the refusal of the Commissioner to increase the excess actual value over book value of real property owned by reason of its acquisition of a mixed aggregate of tangible and intangible property. In 1916 respondent acquired such a mixed aggregate of tangible and intangible property, including the real property in question. In question 8 of its 1918 tax return, respondent affirmatively answered the question of whether it had ever acquired a mixed aggregate of such property. Respondent's request for special

assessment was based on the abnormal condition existing in its income and *invested capital* by reason of the 1916 acquisition. While it is true that until the submission of the additional brief of April 12, 1926, respondent was more concerned with the adjustment of the value of the intangibles than the tangibles, it is also true that from the time the return was filed the question of the valuation of all tangible property, including real estate, was before the Commissioner; and when the seasonably made claim was filed, this specific question was made an issue—an issue which was still alive in February, 1926, when the solicitor's office was still in doubt as to the denial of special assessment (R. 46), and which, as respondent's tender of evidence at the trial was designed to prove (R. 18) was the subject of the oral hearing March 15, 1926, after the statutory time limit for filing claim had expired.

Petitioner cannot help but concede that from the time respondent filed its return and accompanying request for a special assessment an issue was raised as to the proper computation of respondent's invested capital. There never was any other issue before the Commissioner. Invested capital included tangible and intangible property. The tangible property included respondent's real estate. Intangibles such as good will, contracts and similar assets constituted by far the larger portion of invested capital and hence the arguments advanced before the Commissioner and the evidence submitted in support of such arguments were concerned mainly with the intangibles. The fact remains, however, that not only in the request for special assessment but also in the seasonably filed claim respondent continuously urged that its *entire invested capital* be properly calculated for tax purposes.

There were two ways by which such relief could be obtained, first, through special assessment under Sections

327 and 328 of the Revenue Act of 1921, whereby invested capital is determined by the ratio which the average tax of representative corporations engaged in a similar trade or business bears to their average net income, secondly, by the method of calculation provided by Section 326 of the Act. Although the theories of relief under the two sets of sections were different, the issue was still the same, namely, how should respondent's invested capital be calculated for tax purposes. At all times prior to the filing of the refund claim for 1918 the Commissioner had consistently refused relief under Section 326 to taxpayers in the situation of respondent.

Respondent, therefore, asked for relief in the original claim for 1918, under Sections 327 and 328. After the filing of the refund claim for 1918 and in September, 1925, the Board of Tax Appeals decided the *St. Louis Screw Company* case (2 B. T. A. 649). That decision in a case practically on all fours with this aroused the hope in respondent that it might obtain relief under Section 326. It was after that decision that the so-called amendatory claim was filed. But the Commissioner refused to acquiesce in that decision until 1928, and as matter of fact, denied relief under the refund claim for 1920, although relief was sought therein under Section 326.

The situation is not unlike that disclosed in *Lehigh & Wilkes Barre Coal Co.* v. *United States,* 38 F. (2d) 637, where the United States in a case similar to this asserted that an amendatory claim did not form a proper basis for suit and yet the government itself was responsible for the necessity of the amendment. The Court said:

> "The objection to the form of petitioner's claim as filed February 10, 1925, is that the claim did not specify the ground for the refund of taxes paid. The answer to this objection is that it was impossible

for the petitioner to specify the ground for the refund for the reason that the petitioner's return had not yet been audited, and the petitioner was unable to state at the time the specific ground for its claim for the refund on February 10, 1925, or within the period of the Statute of Limitations. *The law does not compel a person to do an impossible thing and, here the thing was impossible not because of any act of the petitioner, but because of the failure of the Commissioner to audit the petitioner's return* within the period of the Statute of Limitations. *Furthermore the Commissioner of Internal Revenue made no objection to the form of petitioner's claim filed February 10, 1925; this the court considers important in this case.*

Regardless of any defect of form or sufficiency in the original claim for refund, the delay of the Commissioner of Internal Revenue to audit the petitioner's return within the period of the Statute of Limitations and the impossibility on the part of the petitioner to file a more specific claim within the period of the Statute of Limitations *and the fact that no objection was made to the form of the petitioner's original claim for refund which amounts to a waiver of any irregularity and the subsequent amendment, specifying the grounds of petitioner's claim for refund* prior to the final rejection, made the claim effective. *Zeller et al* v. *United States,* 35 Fed. (2) 870; *Art Metal Construction Co.* v. *United States,* 35 Fed. (2) 379; *Philip Wunderle* v. *McCaughn,* U. S. District Court, Eastern District of Pennsylvania, not yet reported; *Tucker* v. *Alexander,* 275 U. S. 228."

Lastly, it is important to note that the statute here involved was enacted as remedial legislation. It was designed to allow recovery by a taxpayer of money which he had paid to the government through mistake. Certainly if there is any doubt as to the meaning or application of the statute

it should be resolved in favor of the taxpayer so as to afford the relief intended instead of being used as a means of preventing the return by the United States of money which does not belong to it.

As was said by this Court in a somewhat analogous situation in *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258:

> "The Section is a part of a tax law giving to taxpayers opportunity to secure refund of over payments that had become barred. Manifestly, it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide."

Petitioner conceded in its affidavit in support of its application for permission to amend its answer that respondent was entitled to recover on the merits (R. 60). This was approximately five years after the time for filing claim for refund had expired. During those years the Commissioner had heard arguments and received evidence on the merits of the question of increasing respondent's invested capital, had considered and denied the claim on its merits and afterwards the United States stood by idly for the two and a half years that this case had stood at issue awaiting trial on the merits, before the government in any way indicated that it considered the original claim defective or not a proper basis for suit. The situation is similar to that in *Howbert* v. *Penrose*, 38 F. (2d) 577, 580, where the Circuit Court of Appeals for the Tenth Circuit said:

> "* * * *The defendant concedes that he (the plaintiff) is entitled to it on the merits, and while 'men must turn square corners when they deal with the Government' * * * the government ought to turn square corners when dealing with its citizens.* There is another maxim applicable in both of these appeals and that is that substance should be given

the right of way over form, *Eisner* v. *Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 46 S. Ct. 449, 70 L. Ed. 886.

"The claim for refund should have been more particular; but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer. The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

POINT II.

The "brief" filed with the Commissioner April 12, 1926, was a permissible amendment of a "duly filed" claim for refund sufficient to support the maintenance of this suit.

The Circuit Court of Appeals in ruling in favor of respondent herein, held that the "brief" filed April 12, 1926, was a valid amendment of the seasonably filed claim sufficient under the statute and regulations to support maintenance of this suit since it not only set forth and brought to the attention of the Commissioner the data upon which this suit was brought, but also was accepted, considered and passed on by him. The great weight of authority supports this view.

Tucker v. *Alexander*, 275 U. S. 228, is a leading case. In that case the taxpayer at the trial of a suit based on a rejected claim for refund amended his petition to set up a new and original ground of recovery. Counsel for the government acquiesced in the amendment. The taxpayer recovered on the new theory advanced, but the Circuit Court

of Appeals reversed the judgment on the ground that the statute prevented recovery on a ground of relief which had never been set up in the refund claim filed with the Commissioner. This Court granted certiorari and reversed the Circuit Court of Appeals. In its opinion, the Court, speaking through Mr. Justice STONE said (pp. 231-232):

> "Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States (citing cases). * * * *The Statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.* Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of limitations. *Finn* v. *United States,* 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. Rep. 82. Such waivers if allowed would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—*consequences which do not attach to the waiver here.*"

In *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, the taxpayer had never even filed a formal claim for refund, and hence, *although as in the case at bar, the Commissioner had accepted the data filed as a claim and considered and passed on it as such, the government went into court contending that no timely claim had been filed.* Upon all the circumstances this Court held, speaking through Mr. Justice BUTLER, that, since the Commissioner had treated the documents before him as a claim, and since by his own actions he admitted that he had not been misled, and had been informed of the reason for relief urged in the suit, there was a substantial compliance with the statute which, having been designed for relief rather than for oppression, should be held to have been complied with.

In *Union Trust Co.* v. *McCaughn,* 24 F. (2d) 459, 461, the Court, after quoting *Tucker* v. *Alexander* (*supra*) as to the purposes and objects of a claim for refund, said:

> "If those objects have been attained, the statute has been sufficiently complied with even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view of his letter, he will be held to have done so."

The allowance of a recovery based on an amendment of a timely filed claim for refund was allowed in the following cases, among others, although in each instance the amendment was filed after the time for filing claims had expired:

Lehigh & Wilkes Barre Coal Co. v. *United States, supra;*
Zeller v. *United States,* 35 F. (2d) 870;
McKesson & Robbins v. *Edwards,* 57 F. (2d) 147;
Lancaster Cotton Mills v. *United States, supra;*
Memphis Cotton Oil Co. v. *United States,* 59 F. (2d) 276.

The basis of the decisions is two-fold, first, that the purposes of the statute had been complied with in that the Commissioner by his acceptance and consideration of the claim was being sued on a ground of relief of which he had been fully advised in time to make a refund, and, secondly, even assuming that strict compliance with the statute was necessary, there had been a permissible waiver by the Commissioner of such strict compliance.

In its opinion in *Lancaster Cotton Mills* v. *United States, supra,* the Court makes a significant reference to the practice followed by the office of the Commissioner which is not only particularly apposite here but also illustrates the practical soundness of the Court below in holding that a seasonably filed claim may later be amended before rejection. The Court says (p. 275):

> "It is the regular practice of the Commissioner's office upon the receipt of refund claims to make a record thereof in the claims control section and to route such claims to the proper division of his office for consideration and action, and thereafter to record the action taken thereon. *Williams & Co.* v. *United States,* 39 F. (2d) 1019, 48 F. (2d) 672, 71 Ct. Cl. 1. In point of fact, therefore, it has long been the practice of the Commissioner to consider the cases to which such claims relate and to take some action on the claims. In some cases he allows an overpayment to the extent that it is justified by the record before

him, as in this case. In other cases he calls the attention of the taxpayer to the insufficiency of the claim. In other cases he rejects the claims. This practice of the Commissioner is authorized by the statutes. *We think the practice followed by the Bureau should be given weight in determining whether a claim that is defective gives the Commissioner jurisdiction beyond the limitation period of five years, and we think such a defective claim may be amended and perfected before it has been acted upon by the Commissioner.*''

POINT III.

Petitioner has failed to show either by reason or authority that the decision of the Circuit Court of Appeals should be reversed.

A.

Petitioner's first argument is that the ''brief'' filed April 12, 1926, which the Circuit Court of Appeals held to be an amendment of the claim filed in 1924, must be regarded as an original claim. This argument is based on the theory that the Commissioner was not informed until April 12, 1926, that respondent objected to his failure to include in invested capital the proper value of certain of respondent's real estate and intangibles. As we have already pointed out, up to the amendment of the regulations in 1929, the Courts had held that under the statute permitting suit it was immaterial whether suit was brought on the grounds, theories or statutes referred to in the claim so long as the Commissioner knew what the claim was about. The fact that the Commissioner accepted and passed on the so-called amendatory claim showed that he, the officer charged with the duty of administering the statute, considered the new matter either an amplification or an amendment of the

claim theretofore filed and not a new and original claim. Hence, we believe that it is immaterial whether or not the affidavit and exhibits filed April 12, 1926, set up a new and original theory of recovery. However, we think it plain that the additional memorandum did not constitute a new and original claim within the meaning of the statute as shown by our argument at pages 12-17 under Point I of this brief, and which to avoid repetition will not be repeated here.

B.

Petitioner refers to the recent decision in *Solomon* v. *United States,* 57 F. (2d) 150, where the statement was made that the distinction between what may be amended and what may not be is one of degree and on this premise argues that the situation is analogous to one where an attempt is made to amend a pleading to set up a new and distinctly different cause of action after the Statute of Limitations has run. We feel that there was no amendment here. The arguments advanced and evidence submitted may have varied during the course of the presentation of the case to the Commissioner but the issue remained the same. A closer analogy would be the amendment of a creditor's claim in bankruptcy after the time for filing claim had expired. In such cases, as here, authorization for the filing of claim is given by a remedial statute. The widest possible latitude is allowed in order that *equities and not technicalities may control.* Moreover, great weight must be given to the action of the Commissioner, as the officer charged with the administration of the statute, acting in the exercise of a discretion even greater than that of a trial judge, in allowing the amendment.

C.

Petitioner also suggests that possibly the Commissioner's letter indicating his intention of rejecting the claim might be considered a rejection in which case an amendment would be too late. The fact that neither the Commissioner nor either of the Courts below ever considered that the claim was rejected until the rejection schedule was signed September 3, 1926, furnishes a logical reason for petitioner's temerity in merely suggesting rather than arguing this point. However, in *Michel* v. *United States,* 37 F. (2d) 38, 40, reversed on other grounds, 282 U. S. 656, the Court said:

> "(1, 2) In the present case the clause prescribing notice was intended for the protection of the citizen, and the statute did not begin to run until notice was given. It is said that the letters from the Commissioner advising the plaintiffs here that their claims 'would be rejected' were sufficient notices to comply with the law. The statute, however, prescribes a notice 'after' the disallowance. The word 'after' is not merely technical, but seems to us to go to the essence. It requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophecy of the Commissioner—a prophecy subject to a possible change of the latter's opinion. *The rejection appearing on the schedule approved by the Commissioner, and not the letter forecasting his action, represented his final decision as a matter of law. Girard Trust Co.* v. *United States,* 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524. It is the rendering of this final decision of which notice had to be given."

D.

The point which petitioner seeks to interject that the Commissioner's consideration of the so-called amended claim after notice of his intention to reject the claim involved a possible attempt by him to waive the period within which suit could be brought is foreign to the issues here involved and clearly outside the scope of the permissible argument.

E.

Lastly, only a brief reference to the decisions in similar cases cited by petitioner is needed to show either that they are not in point or support the decision which petitioner seeks to have reversed.

United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, did not involve the same issue that is involved in the case at bar. In that case suit was brought on an altogether different claim than that presented to the Commissioner. *There was not even an attempt to amend the claim, much less acceptance and consideration by the Commissioner of an amendment.* As this Court said:

> "* * * neither in its claim for refund, its brief, nor at the hearing, was mention made of the deduction now claimed."

In *Jonesboro Grocer Co.* v. *United States*, 66 Ct. Cls. 320, the taxpayer in March, 1918, filed its 1917 return paying the tax shown to be due thereon. In July, 1919, the taxpayer filed an amended return for 1917 and a claim for refund of some $400 based thereon. The claim for refund

was rejected but the Commissioner determined that the taxpayer had in other respects overpaid its 1917 tax and allowed an over-assessment of over $1,300, which the taxpayer accepted as a credit against its 1918 tax. At this stage it appeared that both the taxpayer and the Commissioner considered the matter closed. In 1924 and after the expiration of the statutory period *for filing a claim for refund* for the year 1917, the taxpayer filed a new and second claim for a refund of part of its 1917 tax which was in no way related to the first claim for refund and which concededly was not amendatory thereof. The Commissioner failed to note that the second claim was filed too late and allowed it. Later, the Commissioner discovered that the claim had been filed too late and rejected it. Since the claim originally filed had been fully and finally disposed of, before the attempted amendment there was no claim in existence which could jurisdictionally be the subject of amendment.

In *Feather River Lumber Co.* v. *United States,* 66 Ct. Cls. 54, the taxpayer filed a so-called claim for refund of a portion of the tax paid for the year 1918. The Commissioner did not object to the sufficiency of the claim and allowed a refund thereon. In May, 1925, the taxpayer wrote a letter to the Commissioner calling attention to the fact that in auditing the 1918 return the Commissioner had failed to deduct a certain loss. The Court held that suit could not be maintained on the matter set forth in the letter of May, 1925, for the reason that it did not in any sense constitute a claim for refund. It was pointed out that the requirement that the claim for refund must be filed was to give the Commissioner a chance to review his actions and to correct errors, and that he could not do this if the taxpayer failed to advise him of the ground relied upon for recovery. Obviously, that condition did not exist in the case at bar.

The decision in *Grays Harbor Motorship Corp.* v. *United States,* 45 F. (2d) 259, did not involve either an amendment of a claim for refund or a consideration by the Commissioner of the data upon which suit subsequently was brought. Since suit was brought on a theory or ground of which the Commissioner was never advised, it was properly held that the statute had not been complied with.

Snead v. *Elmore,* 59 F. (2d) 312, recognizes the propositions (1) that a claim for refund may be amplified or amended after filing and (2) that the Commissioner may waive the requirement that suit must be brought on the same theory or facts brought to his attention in the claim for refund. As the Court pointed out in that case, however, there was no attempt either in the amendment of the claim or the correspondence between the taxpayer and the Commissioner to set up the reason for recovery upon which the suit was based; moreover, there was no waiver. Hence, the Court held, the taxpayer was precluded from recovering in the suit on the altogether new matter which had never been brought to the attention of the Commissioner.

In *Art Metal Construction Co.* v. *United States,* 47 F. (2d) 558, no claim whatsoever was filed within the statutory time limit and therefore there was nothing to amend. The taxpayer did file a so-called claim which stated that it had overpaid its taxes for the year in question in the sum of "$1 or more" and requested refund of the amount of any overpayment which might be shown to be due under future rulings or decisions or "for other reasons". As the Court said, this was nothing less than an expression of intention to file a claim in the future. The case clearly has no bearing here.

The decision in *Bemis Bros. Hay Co.* v. *United States,* 60 F. (2d) 944, is not controlling here for several reasons.

First, the Court had before it a stipulation, the effect of which was, that the taxpayer could not recover if the claim for refund *as filed "within the time provided for law"* did not set up the ground of relief relied upon in the suit. Secondly, the Court proceeded on the erroneous assumption that a letter from the Commissioner to the taxpayer advising that the claim for refund "will be rejected" was a rejection of the claim. *Michel* v. *United States, supra.* Lastly, the Court pointed out that it was not seriously contended that the Commissioner, by reconsidering the claim after said notice of intention to reject had by waiver, extended the time to amend or amplify the claim.

In *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626, it seems from the opinion of the Court that it raised on its own motion the question of whether the claim sued on was the same one set up in the claim for refund. The Court said the record was not clear on this point and observed that suit cannot be brought on a ground different than that set up in the claim for refund. The decision was based on the merits and hence, apparently, the statement respecting claim for refund was *obiter dictum.*

J. P. Stevens Engraving Co. v. *United States,* 53 F. (2d) 1, and *H. Lissner Co. Inc.* v. *United States,* 52 F. (2d) 1058, like some of the decisions referred to above, did not involve either the question of an amendment to a claim, or a so-called waiver. In each of these cases it was held that the statute will not permit suit on a ground which never has been brought to the Commissioner's attention. In each case the wording of the opinion indicates that the statute would be satisfied if the Commissioner was apprised at any time before rejection of claim of the theory upon which relief was sought in the suit, no matter how informally the data was presented to him.

In *Solomon* v. *United States,* 57 F. (2d) 150, the taxpayer had filed a claim seeking relief on a ground concededly different from that upon which suit was brought. The taxpayer stated in the claim that brief in support thereof would follow. No brief or data was submitted in support of the claim. Accordingly the Commissioner notified the taxpayer that the claim would be rejected for lack of information and later formally rejected it by signing a rejection schedule containing the rejection. Thereafter the taxpayer asked for leave to reopen the claim, but the request was denied. The Court naturally held that the suit could not be maintained.

J. H. Williams & Co. v. *United States,* 46 F. (2d) 155, is another case which does not involve the questions of amendment or of waiver. The case is somewhat similar in its other aspects to the *Art Metal* case, where the taxpayer filed what was really only a notice of intention to file a claim later. As in that case, the taxpayer stated that it was without information to support the claim, which was being filed merely to save its rights under the statute of limitation. Obviously, the decision deals with a situation which is altogether different from the case at bar.

Taylor-Lockwood Co. v. *United States,* 45 F. (2d) 284, likewise did not involve any question of amendment or of waiver. The sole issue was whether the timely filed claim set forth the same grounds of relief as was urged in the suit. The Court held that it did not and accordingly denied a recovery.

POINT IV.

The Circuit Court of Appeals erred in refusing to include in respondent's invested capital for 1918 and 1920 the actual value of the intangible property acquired in 1916.

Respondent was organized in August, 1916, with a capital of $10,000 (R. 18). The purpose of the organization was to acquire the business, property and assets of Prentiss Tool & Supply Company, a corporation organized in 1878, and which, from that date to 1916, had been engaged in the business of buying and selling machine tools (R. 18, 19, 45-49). On August 17, 1916, plaintiff acquired from Prentiss Tool & Supply Company 100 shares of Atchison, Topeka & Santa Fe stock, at that time owned by the latter company, and issued in payment therefor all of its own capital stock (R. 18, 45, 46). The stock so acquired had an actual value of $10,000, was carried on the books of Prentiss Tool & Supply Company in the sum of $10,000 and was entered on the books of plaintiff at the same sum (R. 18).

Immediately thereafter the capital stock of plaintiff was increased to $500,000 (R. 54). Thereupon arrangements were made between plaintiff and Prentiss Tool & Supply Company whereby the latter was to sell to plaintiff and plaintiff was to acquire all of the "business, property and assets, real and personal, of Prentiss Tool & Supply Company, *including name, good will, contracts and rights of every character and description*", subject, however, to the debts and obligations of that company (R. 46-49).

The arrangement provided that plaintiff was to issue 4,900 shares of its capital stock of the par value of $490,000 in payment for the property to be so acquired (R. 46).

The arrangement for such sale and acquisition is set forth in, and authorized by, resolutions adopted at meetings of stockholders and directors of both companies held August 17, 1916, and August 26, 1916. Copies of the resolutions are annexed to the stipulation of facts entered into between the parties herein (R. 45-52) and were also attached to the brief filed with the Commissioner of Internal Revenue dated April 8, 1926, being Exhibit No. 12, not printed in accordance with stipulation and order omitting exhibits (R. 122).

The sale was effected, the properties were acquired by plaintiff, the stock was issued therefor, and the transaction was in all respects performed and carried out and set forth in the resolutions above referred to.

The property so acquired by plaintiff for $490,000 par value of its stock consisted of cash, accounts receivable, securities, inventories, fixed assets and intangibles.

There was no entry on the books of the Prentiss Tool & Supply Company covering intangibles or the value thereof. It is stipulated, however, that the Prentiss Tool & Supply Company owned intangible properties which were included in the transfer and that plaintiff acquired such intangibles and that the value thereof was at least $300,000 (R. 43). The fact is that the exclusive sales agency contracts, among other intangible assets acquired by respondent from its predecessor, were the main income-producing factors in its business and constituted assets of great value.

Plaintiff in opening its books entered the property and assets acquired at the same value and in the same manner as theretofore carried on the books of Prentiss Tool & Supply Company, and the opening balance sheet of plaintiff was the same as the closing balance sheet of Prentiss Tool & Supply Company, except for necessary changes in surplus

and capital, the normal incident of the higher capital of plaintiff. Plaintiff did not make any entry or show on its books any item for intangibles or the values existing therein.

Section 326 (a) of the Revenue Act of 1918 (40 Stat. 1092) provides:

> "(a) That as used in this title the term 'invested capital' for any year means * * * :
>
> (4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest; * * * "

Section 325 (a) of the Act provides that good will, franchises and other like property are included within the term intangible property.

The first authoritative decision construing paragraph 4 of Section 326 was handed down by the Board of Tax Appeals in the case of *St. Louis Screw Company,* 2 B. T. A., 649. We believe that that case is on all fours with the case at bar. There the taxpayer had been organized with a capital stock of $200,000 to take over the business of another corporation of the same name whose charter had expired. The said $200,000 of capital stock was issued for "all of the business and assets, real, personal and mixed, and the good will of said dissolved corporation." The value of the tangible assets was greatly in excess of $200,000. Among the intangible assets were two income producing patents and also good will. The issue involved was whether the taxpayer was entitled to include in invested capital any part

of the cash value of the patents and good will acquired by it. The Board of Tax Appeals in ruling in favor of the taxpayer said:

> "There can be no question as to the right of this taxpayer, under the provisions of both Acts, to include in invested capital the full cash value of tangible properties paid in for shares of stock at the time of payment, including the excess of the actual cash value of such properties over the consideration paid therefor, a right which the Commissioner had properly conceded. But what was the par value of the shares of stock by which the excess of the value of the tangibles should be measured? What was the par value of the shares of stock, if any, issued for the patents? And, finally, was the good will bona fide purchased with shares of stock of this taxpayer?
>
> "As has been noted above, the taxpayer issued $200,000 capital stock for tangibles and intangibles having an aggregate value of $489,558.27. *No part of this total was specifically issued for either the tangibles, patents, or good will. It is no more correct to say that the capital stock was issued for the tangibles than it is to say that it was issued for the patents and good will. We therefore think that the Commissioner erred in applying the entire amount of the capital stock issued against the tangibles and in refusing to allow the inclusion in invested capital of any amount whatever for patents or good will.* Inasmuch as the entire capital stock was specifically issued for three classes of assets, *we think that the amount thereof should be allocated to the three classes of assets according to their cash value at the time paid in.* Upon such a computation it is found that $170,020 capital stock should be allocated to tangibles, $12,440 capital stock to patents, and $17,540 capital stock to good will. Since no part of the capital stock was specifically issued for any class of assets, the taxpayer is entitled to a paid-in surplus of

the excess cash value of the net tangibles over the par value of the capital stock allocated to such assets:

Net cash value of tangibles	$416,174.26
Par value of capital stock allocated thereto	170,120.00
Paid-in surplus	$246,154.26"

That decision was reaffirmed subsequently in other cases decided by the Board of Tax Appeals, among them being:

Appeal of Mandel Brothers, 4 B. T. A. 341;
Tyler & Hippach, Inc., 6 B. T. A. 636;
Penn. Cent. Brewing Co., 9 B. T. A. 264;
D. N. & E. Walter & Co., Inc., 10 B. T. A. 620.

In 1928 the Commissioner of Internal Revenue acquiesced in this decision, Cumulative Bulletin VII-1, p. 28, Rulings, January to June, 1928.

The District Court arrived at the same decision, saying that there was no doubt, as stated in the stipulation, that the intangibles were part of the consideration paid for the $490,000 issue of capital stock when originally issued and that the facts and not the book entries should govern (R. 25).

Doyle v. *Mitchell,* 247 U. S. 179, 187;
Isbell Porter Co. v. *Commissioner of Internal Revenue,* 40 F. (2d) 432.

In *Lafayette-South Side Bank* v. *Commissioner,* 33 F. (2d) 646, 648, the Board of Tax Appeals had refused to include good will in invested capital on the amalgamation of two banks. On appeal to the Court of Appeals for the

District of Columbia that Court affirmed the decision, saying:

> "Appellants' contention, however, is effectually answered by the fact that the parties expressly stipulated in the organic contract that no value should be placed upon the good will of the old banks when transferred to the new bank, and that no stock was actually issued therefor. The value of the good will accordingly cannot be included in the invested capital *since no stock was issued therefor.*"

We believe that that case impliedly concedes that where stock is issued for a mixed aggregate of tangibles and intangibles, as here, the taxpayer is entitled to include intangibles in invested capital. If in that case as here there had been a provision that stock should be issued for a mixed aggregate of tangibles and intangibles, the Board of Tax Appeals and the Court of Appeals would have followed the *St. Louis Screw Company, supra.*

The Circuit Court of Appeals herein based its decision on the ground that there should have been a specific issue of stock for intangibles. The Court said (R. 79):

> "It is apparent that to include good will as invested capital the stock of the company must be specifically issued for the intangibles. It is not enough to issue it for the property generally which was taken over."

Plainly this holding is directly contrary to the decision in the *St. Louis Screw Company* case (*supra*) and the decisions in similar cases by the Board of Tax Appeals cited above.

Only a brief reference is necessary to the cases cited by the Circuit Court of Appeals in support of its holding to show their inapplicability.

The case of *LaBelle Iron Works* v. *U. S.*, 256 U. S. 377, deals with the question of the right to capitalize an increase in the value of property as earned surplus. It does not deal with a case where there has been the acquisition by purchase of property for shares in a corporation, and, therefore, Section 326 (a) is not applicable.

In *Crossett* v. *U. S.*, 50 F. (2d) 292, the Court of Claims specifically stated in its opinion:

> "It was agreed that of said property acquired, sufficient was to be taken at book value to pay at par for said stock, and the balance was to constitute a surplus at the organization of the corporation."

In other words, the *Crossett* case is exactly similar to the case of *Lafayette-Southside Bank* v. *Commissioner* (*supra*) because it was specifically agreed that the stock was paid for with the tangibles and not with intangibles.

In *Landesman* v. *Commissioner*, 44 F. (2d) 521, there was a definite finding that all the stock was issued for tangibles and no stock was issued for intangibles. The Court did state that no doubt good will existed and was acquired by the corporation and was in that sense probably an element affecting consideration paid for the property acquired. It was pointed out, however, that no stock was issued for the intangibles. In the present case there is an express finding amply supported by the evidence that stock was issued for intangibles. From the records of the *Landesman* case as it appears in 15 B. T. A. 64-66, it appears that the resolutions under which the stock was issued provided that all of the stock should be issued for specific tangible properties. In the instant case the resolution was that the stock should be issued for tangibles and intangibles and there is a finding of fact that stock was issued for good will. The Board of Tax Appeals in the *Landesman* case

neither enlarged upon nor overruled its prior decision in the *St. Louis Screw Company* case which has been consistently followed by the Board of Tax Appeals. The Board of Tax Appeals in the *Landesman* case disposed of the case upon the ground that the existence of good will had not been established.

We believe, therefore, that the decision of the Circuit Court of Appeals in refusing the inclusion in invested capital of the intangible property for the years 1918 and 1920 was erroneous.

Conclusion.

The decision of the Circuit Court of Appeals, so far as it denies the inclusion of the value of intangible property in invested capital for the years 1918 and 1920 should be reversed, and its decision as to the inclusion in invested capital of the actual value of real property for the years 1918 and 1920 should be affirmed.

Respectfully submitted,

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Appendix.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1091, 1092, 1093:

SEC. 325. (a) That as used in this title—

The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trade-marks, trade-brands, franchises and other like property;

The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdivision (a) of section 326, section 330, and section 331.

(b) For the purposes of this title, the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares.

SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of

the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided,* That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the pre-war period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable

year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

Revenue Act of 1921, c. 136, 42 Stat. 227, 268:

SEC. 252. That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the

taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342:

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 116:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918 * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-

profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. App., Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall

be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. App., Title 26, Sec. 156.)

Treasury Regulations 62:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. • • •

CORRECTED COPY p. 6 + 7.

SUPREME COURT OF THE UNITED STATES.

No. 234.—October Term, 1932.

The United States of America, Petitioner,
vs.
Henry Prentiss & Company, Inc., Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

[January 9, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

Respondent (the plaintiff in the court below) brought suit against the United States in a District Court to recover overpayments of income and excess-profits taxes for the years 1918 and 1920. The overpayments had come about, so it was claimed, from the undervaluation by the Commissioner of the respondent's invested capital, with a consequent exaggeration of the profits to be taxed. Two items or classes of property were the subject of the controversy. In each year there has been an omission to include the full value of the real estate; indeed the parties have stipulated that the value of the real estate was greater by the sum of $46,371.08 than the sum allowed in the assessment. In each year also there had been an omission to include the value of intangible property, and particularly good will. The District Court held that there could be no relief in respect of either item for the year 1918 because the claim for refund filed with the Commissioner did not comply with the statute and the Treasury Regulations. In respect of both items, real estate and intangibles, relief was granted to the taxpayer to the extent of overpayments for the year 1920. The result was a judgment in favor of the respondent for $7,975.21. Cross-appeals followed to the Court of Appeals for the second circuit. Upon the taxpayer's appeal, the decision was that the defective refund claim for 1918 had been made good by amendment, and that the tax for that year, as well as for 1920, had been overpaid as to the real estate. Upon the government's appeal, the

decision was that the item of intangibles should have been excluded for both years. 57 F. (2d) 676. A writ of certiorari, designed to bring up the ruling as to the amendment of the claim for 1918, was granted by this court on the petition of the government. No petition for a writ was submitted by the taxpayer.

On June 16, 1919, respondent filed its income and excess profits tax return for the year 1918, showing a total tax of $535,144.20, which it paid. On December 28, 1920, it paid for the year 1918 an additional tax of $119,191.19, as the result of an additional assessment, receiving back, however, $9,559.19 on the completion of the audit. Within the time prescribed by law there was filed with the Commissioner, on March 14, 1924, a claim for refund. In this claim, the respondent demanded the repayment of $200,000. It stated in substance as the ground for this demand that owing to abnormal conditions affecting its invested capital and income, there could be no fair computation of the tax by the appraisal of the cash value of its property in accordance with § 326 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1091, 1092, 1093), and that it should have the benefit of a special assessment under §§ 327 and 328.

Section 327 of the Act provides in subdivision (d) that the tax shall be determined in accordance with § 328 "where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328."

Section 328 provides in effect that in cases covered thereby the tax shall be computed without reference to the value of the invested capital and shall be determined by the ratio which the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income.

The respondent's claim for refund, with the specification of the erroneous denial of a special assessment as the statement of its grievance, was filed, as we have seen, in March, 1924. On May 14 of that year, the respondent received from the Com-

missioner a letter acknowledging the filing and notifying the claimant of the procedure to be followed. "No consideration", it was there written, "may be given under the provisions of Sections 327 and 328 until statutory net income and invested capital are definitely determined. It is therefore necessary that you acquiesce in the net income and invested capital as shown in the revenue agent's report of March 25, 1920, for the year 1918, or submit exceptions, if any, which you may take thereto. If exceptions are taken they should be presented in the form of an appeal prepared in accordance with the provisions of Treasury Decision 3492, a copy of which is enclosed."

The respondent does not assert that in response to this notice it took any appeal or filed any exceptions complaining of the assessment of capital or income. If any such document were in existence, it would have been equivalent to an amendment of the claim, and no doubt would be in evidence. What the respondent chose to do was obviously to acquiesce in the report that the cash value of the capital had been fairly ascertained, and to take its stand on the position that under §§ 327 and 328 its tax should be determined without reference to such value and in accordance with other methods both exceptional and discretionary. Accordingly the Commissioner proceeded to a consideration of the claim that error had been committed in failing to give the taxpayer the benefit of a special method of assessment. On July 16, 1925, the respondent was advised by written notice that there was no evidence of abnormal conditions sufficient to call for a departure from the usual forms of computation. The notice, signed by an acting deputy commissioner, closes with these words: "In accordance with the above conclusions, your claim will be rejected." To this is added a statement that the collector for the taxpayer's district will be officially notified of the rejection at the expiration of thirty days.

Notwithstanding this notice, the Bureau of Internal Revenue kept the proceeding open. Writing to the respondent on February 23, 1926, the Solicitor of the Bureau states that his office has before it for consideration the application for a special assessment of the taxes for 1918, and that "before a final decision is reached" the taxpayer "will be granted an opportunity to be heard orally." If such a hearing is not desired, "the decision in the matter will be based upon the record as it now stands." In answer to that

invitation the respondent requested an oral hearing, which it received, and also filed on April 8, 1926, a statement under oath, which, by concession, was equivalent in form to an amended proof of claim. In this statement the respondent put before the Commissioner the evidence both as to the undervaluation of the real estate and as to the exclusion of intangibles.* The Commissioner rejected the claim on September 3, 1926, by signing the rejection schedule.

We are holding in *United States* v. *Memphis Oil Co.*, — U. S. —, decided herewith, that a general claim for refund, though irregular in form under the Treasury Regulations, may be amended after the period of limitation by specifying the grounds, if the amendment is made before final rejection. A statement, without explanation, to the effect that overpayments have been made in an aggregate amount is broad enough to cover any and all grounds for reassessment and return. This at all events is true where the basis of the grievance is that the tax has been erroneously computed even by the normal method, that there has been a deviation, in other words, from the statutory rule. Such is not the claim in controversy here. Here the taxpayer by its claim as originally presented abandoned the position that there had been any error of fact or law in the assessment of the tax according to the normal method, and planted itself on the position that the special method would be fairer. We are to say whether the ground thus deserted may be recovered by amendment.

The act of the Commissioner of Internal Revenue in granting or refusing a special assessment under § 327 (d) of the Act of 1918 is discretionary and administrative, not subject to be challenged in any court, at least in the absence of fraud or other irregularities. *Williamsport Co.* v. *United States,* 277 U. S. 551, 562. Discretionary and administrative also is the review of his determination by the Board of Tax Appeals. *Williamsport* v. *United States, supra.* If this amendment is permissible, a request for the exercise of a discretionary jurisdiction, will have been turned after the running of the statute (Revenue Act of 1921, c. 136, § 252, 42 Stat.

*Certain forms of intangibles, for example, good will, are excluded in general from the definition of invested capital, but there are special conditions in which there is a duty to include them. Revenue Act of 1918, § 326, (4) and (5).

227, 268; Revenue Act of 1924, c. 234, § 1011; 43 Stat. 253, 342; Revenue Act of 1926, c. 27, §§ 284, 1113, 44 Stat. 9, 66, 116) into a claim of error of law or fact, and hence into a controversy within the jurisdiction of a court. What at the beginning was non-justiciable, with exceptions few and narrow (*Williamsport Co.* v. *United States, supra,* p. 562) will have become justiciable at the end.

An amendment so far-reaching, a metamorphosis so complete, may well be thought to destroy the identity of the claim or cause of action if the analogies of pleading in a lawsuit are to govern our decision. A declaration according to the common count for money had and received may be good though it does not tell us how the money was received or the use established. *United States* v. *Memphis Oil Co., supra.* This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure. All will then depend on the degree and kind of the departure. A cause of action alleging as a grievance that there has been a deviation from a rule of law or the breach of a legal duty in the collection of a tax is far apart from an appeal to an administrative officer to abandon the normal rule or method and substitute another, the substitution being dependent upon administrative discretion. Overpayments there may have been in each case, yet in senses widely different. But the analogies of pleadings are not decisive of the controversy before us, wherever they may point and however helpful they may be. To make our conclusion sound, we must keep in mind also the necessities and realities of administrative practice. A demand for a special assessment in accordance with § 327 (d) of the statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital. On the contrary, the valuation of invested capital is irrelevant if the special method is accepted. The very basis of the application for the use of such a method is the presence of abnormal conditions whereby an unfair and disproportionate burden will be laid upon the taxpayer if invested capital is to be reckoned according to the statutory definition (§§ 325, 326) and the profits of the taxpayer subjected to a tax accordingly. Let the new method be adopted, and the value of the invested capital ceases to be a factor in the process. The taxpayer, it is true, may complain even then that there is a variance be-

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tween such capital when restricted to the elements covered by the statute and invested capital when viewed as an economic concept, and that by reason of special conditions there should be an addition of other elements commonly excluded. See, e. g., ~~*Tipton Cotton Mills*~~ v. *Commissioner*, 11 B. T. A. 914, 921. Indeed that is the very reason why a special assessment becomes necessary. The fact remains, however, that the grievance does not grow out of a failure of the assessors to value the invested capital truly according to the statute. It has no relation, for example, to an assessment of tangible property, such as land or buildings, at less than the cash value. The grievance that will support an application for a special method of assessment under subdivision (d) of § 327 assumes adherence to the statute, and counts upon extraordinary conditions as justifying a claim that the statute is oppressive. If the special method is accepted, the income of the taxpayer is considered without reference to capital as commonly determined, and the tax becomes proportionate to that of other representative corporations engaged in a like business.

A claim or cause of action will be ill-defined for the purpose of an administrative remedy if the definition gives no heed to the understanding or conduct of administrative officers. We are to ask ourselves how a request for a special method of assessment might be expected to be viewed or acted on by those required to consider it. The presentation of such a claim, unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of assets and liabilities* The two proceedings, alike in form and in consequences, are essentially diverse. By the very terms of the statute [§ 327 (d)], the special assessment is the outcome of a special application; it is made on motion of the taxpayer. A revision for error of fact or law, on the other hand, may be made by the Commissioner on his own motion, and indeed is commonly so made, for it is incidental to his general duty to audit the accounts. Upon an application for

*The range of investigation upon special applications is considered by Albert E. James, a former member of the Board of Tax Appeals in an article "Special Assessment Cases in the Courts and the Board," published in vol. 8, part 1, National Income Tax Magazine, 287, 289, 290, August, 1930. See, also, Investigation of Bureau of Internal Revenue, Senate Report No. 27, Part I, 69th Congress, 1st Session, p. 215.

special relief [under subdivision (d)] there are no compensating adjustments favorable to the government that will move an examiner to reconsider the value of the tangibles, and make it either less or greater. *Lewis* v. *Reynolds,* 284 U. S. 281. He will conceive of the invested capital as deposited in a separate compartment which there is no need for him to open. Upon a claim of deviation from the statute, the taxable balance for the year will be subject to re-audit as if the tax were laid anew. The grievances differ so essentially that the assertion of the one must be felt to be unrelated to any complaint as to the other.

The conclusion derived from the analogies of pleadings in a lawsuit is thus seen to be confirmed by the probabilities, if not the certainties, of administrative practice. If this is not enough, however, there is confirmation from other sources. In the pages of this record we find convincing evidence that by the understanding of the parties the claim for a special assessment was to exclude any claim for the revision of the value of the capital, and that no such claim would be pressed, at all events while the claim for a new method of assessment was alive and undetermined. We have seen that in May, 1924, the Commissioner of Internal Revenue gave notice to the taxpayer that there could be no consideration of the prayer for relief under §§ 327 and 328 of the applicable statute "until statutory net income and invested capital are definitely determined." The taxpayer was accordingly informed in ~~accordance~~, it seems, with the usual practice of the department, that it would be necessary to do one or other of two things: to appeal from the report as to invested capital and income in accordance with a prescribed form, or to acquiesce in it. Cf. *Commissioner* v. *Ohio Falls Dye & F. Works,* 50 F. (2d) 660; *Norton Co.* v. *Commissioner,* 50 F. (2d) 664. The notice would tend to show, though assent to its requirements were lacking, that in the judgment of the men intrusted with the administration of the act, the two subjects of inquiry are diverse and independent. Coupled with the assent of the taxpayer, its significance is heightened. There is no suggestion that the taxpayer, when faced with this alternative, resorted to an appeal. In these circumstances its conduct in proceeding with its application for a special assessment was a tacit assent to the condition imposed by the Commissioner and an abandonment of any objection that capital and income had

conformity

been erroneously valued if valuation was to be ascertained according to the normal method. We have seen that an application for a special assessment involves an appeal by the taxpayer to the Commissioner's discretion. The application being of that order, a condition may reasonably be imposed that the inquiry shall be postponed until other and unrelated objections have been either determined or abandoned. There is room for argument that the taxpayer, having won the privilege of a hearing on those terms, is estopped from retracting its assent and resuming the abandoned ground. *Sturm* v. *Boker*, 150 U. S. 312, 333, 334; *Davis* v. *Wakelee*, 156 U. S. 680, 689. At least its assent is equivalent to an agreement that the claim for a special assessment shall be deemed to be a distinct one from that for a revision of the values. Retraction, if ever possible, must be held to be too late when the statute of limitations has interposed a bar.

The respondent complains of the ruling of the Court of Appeals whereby the value of intangibles was excluded from the invested capital for the year 1920 and the judgment of the District Court modified accordingly. The argument is that this court has jurisdiction in the exercise of its discretion to review those parts of the judgment adverse to the respondent, though no writ of certiorari was granted except to the petitioner, the government, nor was any other even asked for. We are not required at this time either to affirm or to deny the existence of the power that the argument imputes to us. If the power exists, the respondent has not persuaded us that our discretion should be moved to use it.

The judgment of the Circuit Court of Appeals should be reversed to the extent of the petitioner's objections thereto, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.